

In Th Matter Of:

UNITHERM FOOD SYSTEMS v. SWIFT-ECKRICH

**** CONTAINS ATTORNEYS' EYES ONLY PORTIONS ****

SUSAN BURNS

February 14, 2002

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[1] UNITED STATES DISTRICT COURT
[2] WESTERN DISTRICT OF OKLAHOMA
[3] UNITHERM FOOD SYSTEMS, INC.,)
[4] an Illinois corporation, and)
[5] JENNIE-O-FOODS, INC., a)
[6] Minnesota corporation,)
[7] Plaintiffs,)
[8] vs.) No. CIV 01-347-C
[9] SWIFT-ECKRICH, INC., d/b/a)
[10] CONAGRA REFRIGERATED FOODS,)
[11] a Delaware corporation,)
[12] Defendant.)
[13]
[14] THIS DEPOSITION CONTAINS CONFIDENTIAL
[15] ATTORNEYS' EYES ONLY MATERIAL
[16]
[17] The deposition of SUSAN BURNS, called
[18] for examination, taken before GAIL LIVIGNI, a
[19] Notary Public within and for the County of Will,
[20] State of Illinois, and a Certified Shorthand
[21] Reporter of said state, at Suite 200, 184 Schuman
[22] Boulevard, Naperville, Illinois, on the 14th day
[23] of February, A.D., 2002, at 9:00 o'clock a.m.
[24]

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[1] PRESENT:
[2] FELLERS, SNIDER, BLANKENSHIP, BAILEY &
[3] TIPPENS, P.C.,
[4] (100 North Broadway, Suite 1700,
[5] Oklahoma City, Oklahoma 73102-8820
[6] 405-232-0621), by:
[7] MR. GREG A. CASTRO,
[8] appeared on behalf of the Plaintiffs,
[9]
[10] CHRISTIE, PARKER & HALE, LLP,
[11] (350 West Colorado Boulevard, Suite 500
[12] Pasadena, California 91109-7068
[13] 626-795-9900), by:
[14] MR. ROBERT A. SCHROEDER,
[15] appeared on behalf of the Defendants;
[16]
[17] ALSO PRESENT:
[18] MS. LESLIE E. NASH, Paralegal
[19] Christie, Parker & Hale, LLP.
[20]
[21] REPORTED BY: GAIL LIVIGNI, C.S.R.
[22] CERTIFICATE NO. 84-1965
[23]
[24]

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[1] (Witness sworn)
[2] MR. SCHROEDER: Before we begin, let me say
[3] first we have found another document which we're
[4] producing, it's confidential attorneys' eyes only,
[5] and we've marked it CRPF 8000 through 8005.
[6] Secondly, Ms. Burns is being produced
[7] today as to certain topics of the 30(b)(6) notice
[8] of Conagra Refrigerated Foods, Swift-Eckrich, and
[9] those topics were identified earlier in connection
[10] with the deposition of Chris Salm under the same
[11] rule.
[12] We are, with this deposition, getting
[13] into an area where I anticipate that there will be
[14] a lot of attorneys' eyes only highest level of
[15] priority under the protective order, so with your
[16] request, I will raise those issues as they come up
[17] and due to the fact that Mr. Howard is present, so
[18] on that basis, we will just go forward. We're not
[19] waiving the attorney eyes only status of the
[20] documents that will be used today, at least not
[21] until we see what those documents are.
[22] MR. CASTRO: Okay. Let's go through, Bob, you
[23] mentioned topics the other day. I only marked
[24] Mr. Chris Salm, and even then, we had some

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[1] miscommunication yesterday, so I think to expedite
[2] this, what categories are they that Ms. Burns will
[3] testify to today?
[4] MR. SCHROEDER: She will testify as to 27,
[5] some aspects of 28 and 29, 32, 33.
[6] MR. CASTRO: Hold on. 27, 28, 29.
[7] MR. SCHROEDER: Some aspects of 28 and 29, 32,
[8] 33 and 34
[9] WHEREUPON:
[10] SUSAN BURNS,
[11] called as a witness herein, having been first duly
[12] sworn, was examined and testified as follows:
[13] EXAMINATION
[14] BY MR. CASTRO:
[15] Q: Ms. Burns, could you state your name for
[16] the record?
[17] A: Sure, it's Susan Burns.
[18] Q: Could you give us your birth date,
[19] please?
[20] A: Sure, 6-27-63.
[21] Q: Have you ever given your deposition
[22] before?
[23] A: No.
[24] Q: Has your Counsel explained to you what a

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[1] deposition is about?
[2] A: Yes.
[3] Q: Let me give you a few ground rules that
[4] I would like to have here today.
[5] A: Okay.
[6] Q: As you see, a court reporter is here,
[7] and she's taking down every word I say, and she'll
[8] take down every word you say and any other person
[9] who speaks here on the record. Do you understand
[10] that?
[11] A: Yes.
[12] Q: Do you understand that you are under
[13] oath today?
[14] A: Yes.
[15] Q: Do you understand you are under oath as
[16] if you were in front of a judge or a jury?
[17] A: Yes.
[18] Q: And the same penalties of perjury apply
[19] today as they do at the time of trial?
[20] A: Yes.
[21] Q: In order for the record to be clear, why
[22] don't you wait — you may anticipate a question I
[23] have or that I'm going to finish, just like you did
[24] a moment ago. If you let me finish my question and

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[1] present time?
[2] A: Yes. University of Illinois. I had —
[3] that's a business background, so that was a four
[4] year business degree in accounting, BS in
[5] accounting, and then I have a Master's in
[6] Management from Northwestern Keller Graduate School
[7] of Management. It's a Master's in marketing and
[8] management, and that was in 1994.
[9] Q: And your degree, I'm sorry, accounting?
[10] A: 1981.
[11] Q: '91?
[12] A: '81.
[13] Q: I'm sorry, '81.
[14] A: No, I'm it's 1985. I graduated from
[15] high school in 1981. I graduated from college in
[16] 1985.
[17] Q: At any time today or this morning if you
[18] recall that you may have made a mistake in your
[19] earlier testimony or you forgot something, feel
[20] free to add to that testimony, okay?
[21] A: Yes.
[22] Q: And, in fact, if you remember something
[23] at a break, feel free to volunteer it when we
[24] restart the deposition, okay?

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[1] then answer, it will make things a whole lot
[2] better, and I will hopefully do the same thing and
[3] extend the same courtesy to you. Is that fair?
[4] A: Yes.
[5] Q: Further, I'm not here to trick you
[6] today. I am just trying to find out some
[7] information with respect to this litigation. Do
[8] you understand that?
[9] A: Yes.
[10] Q: Therefore, can we have the agreement
[11] that if you don't understand a question that I ask
[12] of you or if you believe that it's confusing, that
[13] you will tell me, and I will try to rephrase it?
[14] A: Yes.
[15] Q: With that understanding, can we also
[16] have the understanding that if you answer a
[17] question that I ask you, that you understood the
[18] question?
[19] A: Yes.
[20] Q: And that your answer is responsive to my
[21] question?
[22] A: Yes.
[23] Q: All right. Could you give us your
[24] educational background from college, college to

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[1] A: Yes.
[2] Q: All right. Also you need to answer
[3] audibly with me and not just a head shake or a nod.
[4] A: Okay.
[5] Q: Because the court reporter won't pick
[6] that up, okay?
[7] A: Yes.
[8] Q: After you received your accounting
[9] degree, did you go to work somewhere?
[10] A: Yes, I did. I went to Arthur Andersen
[11] in Chicago.
[12] Q: What type of work did you do at Arthur
[13] Anderson?
[14] A: Auditing.
[15] Q: For how long?
[16] A: For three and a half years.
[17] Q: So where did you go — was it '88 or '89
[18] that you left Arthur Andersen?
[19] A: Yes, that's correct.
[20] Q: Where did you go?
[21] A: Then I went to Sara Lee Corporation.
[22] Q: Why did you leave Arthur Andersen?
[23] A: Public — I wanted to expand out of
[24] public accounting into more general business.

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[1] Q: Are you married?
[2] A: Yeah. Yes, I am.
[3] Q: Children?
[4] A: Yes, I do.
[5] Q: How many?
[6] A: I have three.
[7] Q: Boys, girls?
[8] A: I have a boy and two girls.
[9] Q: Older boy and two younger girls?
[10] A: Yes, I do.
[11] Q: How long did you work for Sara Lee?
[12] A: I worked for various parts of Sara Lee.
[13] I worked for Sara Lee Corporation — I started
[14] there in their audit group, so I went from audit at
[15] Arthur Andersen to internal audit at Sara Lee
[16] Corporation.
[17] Q: At Arthur Andersen, what were your
[18] responsibilities and duties as an auditor?
[19] A: We did operational and audits of small
[20] businesses. I was in the small business division,
[21] so they were Chicago area companies that we did
[22] operational reviews.
[23] Q: And who was your supervisor?
[24] A: I had multiple supervisors.

[1] A: Nicholas Kiwi makes shoe polish.
[2] Q: Oh, okay.
[3] A: Those types of products.
[4] Q: Kiwi in the little containers?
[5] A: Correct.
[6] Q: Did you ever do any internal auditing
[7] for their food products?
[8] A: No.
[9] Q: And you left there in — would that be
[10] '91?
[11] A: I'd like to — I just recall — I did
[12] for one of their meat companies which was Ballpark
[13] Franks. I did do an audit of Ballpark Franks.
[14] Q: Ma'am, have you ever testified in a
[15] trial before?
[16] A: No, I haven't.
[17] Q: Ever been involved in any litigation?
[18] A: No, I haven't.
[19] Q: What did you do today to prepare for
[20] this deposition, or what have you done to prepare
[21] for this deposition?
[22] A: Since this happened several years ago
[23] that I worked on — did the marketing work related
[24] to this project, whatever we're talking about here,

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[1] Q: Who was your last —
[2] A: There were different managers on every
[3] audit, so I can't recall many supervisors.
[4] Q: What did you do as an internal auditor
[5] at Sara Lee?
[6] A: Did the same type of operational audit
[7] work but internally for Sara Lee corporate
[8] entities.
[9] Q: Which consisted —
[10] A: Divisions of Sara Lee.
[11] Q: Which consisted of what companies? Were
[12] they separate companies?
[13] A: Correct. They were subsidiaries of Sara
[14] Lee Corporation.
[15] Q: Do you recall those subsidiaries?
[16] A: Yes. Hanes, Nicholas Kiwi, just to name
[17] one or two. I was there one and a half years, and
[18] those were my two primary internal clients.
[19] Q: Hanes, Hanes Underwear?
[20] A: Yes.
[21] Q: Nicholas —
[22] A: Nicholas Kiwi.
[23] Q: And what type of products do they
[24] produce?

[1] I reread documents such as sales stories that we
[2] had prepared for the field that I had done. I
[3] reviewed the marketing plan that we had put
[4] together and just reacclimated myself to that type
[5] of paperwork just so that I could try to refresh my
[6] memory as to even the types of marketing work we
[7] did. I pretty much knew it at the top of my head
[8] but just to make sure I remembered a little bit
[9] more of the details.
[10] Q: Are you still in this area of marketing?
[11] A: No, I'm not.
[12] Q: Did you spend any time with
[13] Mr. Schroeder?
[14] A: Yes.
[15] Q: How long?
[16] A: Approximately one hour.
[17] Q: Was that this morning?
[18] A: Oh, I'm sorry, 15 minutes this morning,
[19] and approximately one hour two days ago.
[20] Q: Two days ago when you met with
[21] Mr. Schroeder, who was present?
[22] A: Chris Salm, Leslie and Dennis Gott.
[23] Q: Did you speak with Mr. Gott separately
[24] regarding your testimony today?

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[1] A: No, I did not.
[2] Q: Did you speak with Mr. Salm separately
[3] about your testimony today?
[4] A: No, I did not.
[5] Q: Did you speak with anyone else in the
[6] company with respect to your testimony today?
[7] A: Yes.
[8] Q: Who?
[9] A: My boss relative to my attendance here
[10] today.
[11] Q: Only regarding your attendance?
[12] A: Correct.
[13] Q: Who is your boss?
[14] A: My boss is Mike Perrino.
[15] Q: And what area is Mr. Perrino in?
[16] A: He is the Vice President of Marketing.
[17] Q: What area are you now in with the
[18] company?
[19] A: I'm in marketing still.
[20] Q: What area of marketing?
[21] A: I work on new products, so I'm
[22] specializing a little bit more in new products as
[23] opposed to working on the poultry business
[24] specifically.

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[1] Q: When did you leave Sara Lee?
[2] A: I left the audit part of Sara Lee a year
[3] and a half after I started, and I went to the
[4] bakery, Sara Lee Bakery, so I went to one of their
[5] operating divisions.
[6] Q: Was that in '91?
[7] A: Approximately, yes.
[8] Q: And what did you do in the poultry
[9] division of Sara Lee?
[10] A: No, it wasn't the poultry.
[11] Q: I'm sorry, the bakery division.
[12] A: I was a senior financial analyst.
[13] Q: And what did that job entail?
[14] A: It entailed doing budgets and supporting
[15] the marketing personnel at the bakery.
[16] Q: What do you mean by supporting marketing
[17] personnel?
[18] A: Doing their budgets, helping them with
[19] their marketing plans, doing financial analysis to
[20] help them understand their businesses.
[21] Q: Did you analyze market share, potential
[22] market share of a product?
[23] A: Yes.
[24] Q: Analyze market impact?

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[1] A: Yes.
[2] Q: Try to identify relevant markets of a
[3] product that you wanted to introduce into the
[4] consumer?
[5] A: In a support capacity. The marketing
[6] team there had primary responsibility for growing
[7] their businesses, but they looked to the financial
[8] people to help support them, and I was one of those
[9] financial people.
[10] Q: How long were you senior financial
[11] analyst for the bakery division of Sara Lee?
[12] A: Approximately a year to two years.
[13] Q: And where did you go from there?
[14] A: I stayed with the same organization. I
[15] moved into more of a financial reporting role where
[16] I had accounts payable and payroll reporting to me
[17] and did the consolidation work for accounting for
[18] consolidating different parts of Sara Lee Bakery
[19] worldwide, so it was more of an accounting role.
[20] At that time, I was going to school at night to get
[21] my marketing Master's as well.
[22] Q: Okay. So you started night school in
[23] what year?
[24] A: '90 — '91. I graduated in '94. It

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[1] took me three years at night.
[2] Q: And how long did you go — when did you
[3] leave Sara Lee?
[4] A: So I was still there in '94. Then once
[5] I got my degree in marketing, I moved into the
[6] brand management side of Sara Lee Bakery, so I
[7] stayed there, and I managed the pound cake business
[8] there.
[9] Q: What was your title, pound cake manager?
[10] A: Assistant brand manager.
[11] Q: And what were your job duties as
[12] assistant brand manager?
[13] A: I had P & L accountability for the pound
[14] cake business, and my responsibilities were to grow
[15] market share and to develop programs and execute
[16] programs that met the business objectives of the
[17] retail division.
[18] Q: How long were you brand manager?
[19] A: I left — two years, two and a half
[20] years.
[21] Q: Till '96?
[22] A: Yes.
[23] Q: And where did you go?
[24] A: Then I went to a small company called

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[1] Vandenberg Foods which was part of Unilever at the
[2] time.
[3] Q: I'm sorry, Vandenberg?
[4] A: Vandenberg, V-a-n-d-e-n-b-e-r-g-h.
[5] Q: Okay. And that's a division of what
[6] company?
[7] A: Division of Unilever. It was.
[8] Q: And what did you do at Vandenberg?
[9] A: Brand manager role in their bakery
[10] division. I was only there a very brief time
[11] because they put the company up for sale, and I
[12] didn't want to be part of that. I was only there
[13] for nine months, and that's when I came to work at
[14] Armour Swift-Eckrich.
[15] So October, 1997 is when I started with
[16] Armour Swift-Eckrich in the deli group.
[17] Q: Relatively soon after you started is
[18] when they started this marketing campaign for this
[19] golden brown product, is that correct?
[20] A: Yes.
[21] Q: What was your title when you started
[22] with Armour Swift-Eckrich?
[23] A: My title was marketing manager.
[24] Q: By the way, when you worked with Sara

[1] for that first year or so in the deli group was
[2] primarily related to our poultry business.
[3] Q: Were you hired for a specific brand of
[4] product that was being introduced?
[5] A: No.
[6] Q: Or just would be assigned to particular
[7] projects after you were hired?
[8] A: Yes.
[9] Q: Your attorney today, Mr. Schroeder, has
[10] handed me a document, as he indicated at the
[11] beginning of the deposition, marked CRPF 08000 to
[12] 08005. Is this a document you gave to him?
[13] A: Yes, it is.
[14] Q: Before today, had you been asked to
[15] produce information regarding the marketing of the
[16] products?
[17] A: Yes.
[18] Q: That are subject to this litigation?
[19] A: Yes.
[20] Q: And when were you asked to provide that
[21] documentation?
[22] A: I think it may have been a few months
[23] ago. I don't recall.
[24] Q: Okay. And pursuant to that request, you

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[1] Lee — or, excuse me, when you went to become
[2] assistant brand manager, did you look at market
[3] share information for the pound cake?
[4] A: Yes.
[5] Q: Did you look at what the relevant market
[6] was for that pound cake?
[7] A: Yes.
[8] Q: Look at the impact of the brands of
[9] pound cake you had on the market?
[10] A: Yes.
[11] Q: Cost comparisons, correct?
[12] A: Yes.
[13] Q: With other products, correct? Compared
[14] the price of your product with competitors?
[15] A: Yes.
[16] Q: I'm sorry, what was your title with
[17] Armour Swift when you began in October?
[18] A: Marketing manager.
[19] Q: And what were your duties and
[20] responsibilities?
[21] A: My duties were project related. I was
[22] not assigned to a specific brand or business per
[23] se. At that time, though, we started to take a
[24] look at our poultry business, so my specific duties

[1] produced documents, correct?
[2] A: Yes.
[3] Q: Is this some new information? I haven't
[4] had a chance to look at it yet, so bear with me.
[5] Is this new information that you discovered, or why
[6] is this just being produced today, do you know?
[7] A: I thought that it was something that I
[8] had produced earlier.
[9] MR. SCHROEDER: And possibly it is. We don't
[10] have any way of checking that.
[11] MR. CASTRO: No, it hasn't been.
[12] BY MR. CASTRO:
[13] Q: It appears to be — well, what is it?
[14] Should I make a copy?
[15] MS. NASH: I have an extra copy.
[16] MR. CASTRO: Could you let her look at that,
[17] Leslie, and then we will make a copy for the
[18] Exhibit.
[19] MR. SCHROEDER: Now, that document is marked
[20] attorneys eyes only, so if you are going to ask
[21] questions about the document that will reveal its
[22] contents, we'll have to ask that Mr. Howard step
[23] outside the room at this point.
[24] MR. CASTRO: We will in a minute. I will get

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[1] to it in a second. He is supposed to my legal
[2] assistant today, too, but we'll have to labor
[3] through these documents now.
[4] **BY MR. CASTRO:**
[5] **Q:** Tell me your involvement with the
[6] marketing of the products which are produced by the
[7] '027 Patent?
[8] **A:** I was the project manager on the launch
[9] of this particular product, the golden oven roasted
[10] under the Butterball, Healthy Choice and Eckrich
[11] brand names. So in that role as project leader, I
[12] had the specific role of getting various parts of
[13] the organization together to execute that launch.
[14] **Q:** When did that launch begin?
[15] **A:** That launch began, I guess — can you
[16] describe what you're asking for in terms of the
[17] definition of the official launch?
[18] **Q:** Let me ask you which products were to be
[19] produced by the '027 Patent?
[20] **A:** To my knowledge, it's three products.
[21] It's the Butterball Golden Oven Roasted — it was
[22] Butterball Oven Roasted and Eckrich Oven Roasted
[23] products and Healthy Choice products, so three main
[24] products, three main turkey products.

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[1] **Q:** The Butterball Golden Oven Roasted,
[2] that's what it was going to be called?
[3] **A:** Correct.
[4] **Q:** The Healthy Choice Golden Oven Roasted
[5] and then the Eckrich?
[6] **A:** Eckrich.
[7] **Q:** Golden Oven Roasted?
[8] **A:** Yes.
[9] **Q:** Okay. And were indeed those three
[10] products produced by the process?
[11] **A:** Yes.
[12] **Q:** Are they still being produced by the
[13] process?
[14] **A:** Yes.
[15] **Q:** When did you first learn — tell me how
[16] the process works with the marketing of a product.
[17] I mean which comes first? Does the research and
[18] development people, do they come to you and say
[19] we've got this new idea, what do you think, or do
[20] the marketing people say we're losing out on market
[21] share or we're not selling as much of this product,
[22] come up with a new concept? How did that work in
[23] this case?
[24] **A:** In this case, when I started to work on

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[1] the project, I was assigned the project. It was
[2] given to me, this research document, the Moskowitz
[3] Jacobs study. That study had been completed before
[4] I began starting my job.
[5] **Q:** Okay.
[6] **A:** And my manager at the time presented me
[7] with that document as we were describing what my
[8] role would be in managing the poultry business,
[9] managing the marketing side of the poultry
[10] business.
[11] The impotence for the work, for my work
[12] in the poultry area, was the Moskowitz Jacobs study
[13] which was trying to get at the heart of what
[14] attributes of a turkey breast drive consumers
[15] liking of the product and how we could then, in
[16] turn, improve our product line.
[17] **Q:** Who was your boss? Who told you this?
[18] **A:** Deborah Billow.
[19] **Q:** Well, what caused the launch of this —
[20] excuse me. What precipitated this big Moskowitz
[21] Jacobs study?
[22] **A:** That I don't know.
[23] **Q:** You don't know that?
[24] **A:** I don't know because it was started

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[1] before I came to the organization. However, I
[2] would speculate that turkeys is a big part of our
[3] business. The turkey market is growing, was
[4] growing, and we were looking for ways, I would
[5] guess, to try to improve our market share, try to
[6] improve our product line.
[7] **Q:** Sure. I don't want you to speculate.
[8] **MR. CASTRO:** It would seem to me, Bob, that my
[9] notice would cover all aspects of the marketing of
[10] these products from conception and when they
[11] decided to — why they decided to change the
[12] product, how they learned that they needed to
[13] change the product, and yet unfortunately she came
[14] in after one study had already been done which is
[15] this, oh, 1997 Moskowitz Jacobs study, and she
[16] doesn't know why this study was undertaken.
[17] **MR. SCHROEDER:** Well, which of the categories
[18] do you feel that that question falls under?
[19] **MR. CASTRO:** I would think all information
[20] which refers or relates to market information
[21] concerning products produced by or for Defendant
[22] using the '027 Patent.
[23] **MR. SCHROEDER:** You're talking 33?
[24] **MR. CASTRO:** I'm talking 27.

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[1] **MR. SCHROEDER:** Well, it doesn't seem to me
[2] that the question of why that study was undertaken
[3] falls fairly within that category. She knows what
[4] was done with the study, and she's familiar with
[5] the study itself.

[6] **MR. CASTRO:** Well, I think the question is
[7] general enough and was intended to be general
[8] enough to determine why it is Conagra decided to
[9] change their product, how that began, and whose
[10] decision it was to undertake what I'm sure was not
[11] an inexpensive study to determine what a better
[12] quality product would be delivered to the market.

[13] **MR. SCHROEDER:** Well, most of what you have
[14] just spoken about is something that the witness is
[15] prepared to testify about. The only thing that she
[16] was not prepared to testify about was the decision
[17] to have the study undertaken in the first place,
[18] and I don't see that that is embraced within your
[19] category.

[20] **MR. CASTRO:** Well, we agree to disagree.

[21] **BY MR. CASTRO:**

[22] **Q:** As I understand your testimony, you
[23] don't know why this study — and we'll go ahead and
[24] mark it as your Deposition Exhibit 1.

[1] study was undertaken because Conagra wanted to
[2] improve its sales in the area of turkey products?

[3] **A:** That would be one of the objectives.

[4] That would be probably the overall objective.

[5] **Q:** Was one of the objectives as well to
[6] better compete with the competitors in the market
[7] for these turkey products?

[8] **A:** Yes.

[9] **Q:** Was another reason to improve the
[10] overall appearance of the turkey product produced
[11] by Conagra?

[12] **A:** To improve the overall perhaps product.

[13] I'm not sure at that time that we knew that it was
[14] going to end up being appearance related, but just
[15] in general to make an overall product improvement,
[16] yes.

[17] **Q:** Let me refer you to the second page, if
[18] you would, of that study.

[19] **MR. SCHROEDER:** Just a moment, if we're going
[20] to get into the specifics of the study, at this
[21] point we'll have to ask that the deposition be
[22] designated attorneys' eyes only and that Mr. Howard
[23] leave us temporarily.

[24] **MR. CASTRO:** Okay. Well, just a second.

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[1] You don't understand why that survey or
[2] study was undertaken?

[3] **A:** That's correct.

[4] **Q:** Have you been told why this study was
[5] undertaken?

[6] **A:** If I had to try to remember
[7] conversations that I had with my boss when she
[8] first gave me, you know, the project, it would have
[9] had something to do with the fact that again the
[10] turkey market was a good opportunity, we are a
[11] player in the turkey market, and that it was
[12] something that made sense for us to take a look at
[13] as to how we could, you know, better play in that
[14] market.

[15] That's my recollection of how it would
[16] have been described to me at the time the project
[17] was given to me.

[18] **Q:** When the project was given to you, did
[19] Ms. Billow — this would have been in October of
[20] '97?

[21] **A:** That's correct, or perhaps November. I
[22] didn't start until the end of October, so around
[23] the November of '97 time frame.

[24] **Q:** Was it your understanding that this

BY MR. CASTRO:

[1] **Q:** Were you asked, in preparation for your
[2] deposition today, to determine the initial reasons
[3] why this Moskowitz Jacobs study was undertaken?

[4] **A:** No.

[5] **Q:** Were you asked to determine why Conagra
[6] wanted to make an overall change to its products
[7] relating to the slicable deli turkey breast?

[8] **A:** No.

[9] **MR. CASTRO:** Okay, go ahead.

[10] Again I'll make on the record, Bob, I
[11] think that that information is certainly contained
[12] within my notice and is certainly relevant to this
[13] litigation especially in light of the testimony of
[14] others and specifically Chris Salm when he decided
[15] to use this term golden brown.

[16] **MR. SCHROEDER:** Well, I don't see the
[17] connection between the decision to use the term
[18] golden brown and the reason for deciding to have a
[19] study made in the first instance.

[20] It seems to me that, first of all, it's
[21] very easy to play games with a 30(b)(6) notice, and
[22] that's what you're doing. Secondly, I don't think
[23] this is fairly something that a 30(b)(6) witness

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[1] could reasonably be expected to know pursuant to
[2] category 27. And, thirdly, I think she's answered
[3] your question anyway.

[4] (WHEREUPON, the following
[5] proceedings were had
[6] designated attorneys' eyes
[7] only.)

[8] BY MR. CASTRO:

[9] Q: If you would look at the second page,
[10] was this part of the study, or is this just the
[11] cover memo to that study?

[12] A: This was a cover memo written by the
[13] research person.

[14] Q: And this is a document dated November
[15] 17th, 1997, and it's been distributed to you,
[16] correct?

[17] A: That's correct.

[18] Q: And this memo, as well as the study
[19] which is attached, was it distributed to you on
[20] November 17th, 1997?

[21] A: Yes, it was.

[22] Q: Do you see the first dot there where it
[23] talks about "clearly the visual appeal of both
[24] Butterball Oven Roasted and Healthy Choice Oven

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[1] Q: At this time, what was your involvement,
[2] if any, with the research and development side of
[3] Conagra?

[4] A: At this time?

[5] Q: That's right.

[6] A: At this time, I had only started with
[7] the company a couple weeks before, so I had no
[8] interaction with the market research group.

[9] Q: Okay. What about the research side of
[10] the company, not the market research group. I'm
[11] talking about the research and development, the
[12] technicians, the people who were in the testing
[13] facility working on different products. Had you
[14] had any contact with them as of November 17th,
[15] 1997?

[16] A: The only contact that I had as of that
[17] date would have been an initial meeting with the
[18] product development person that was assigned to the
[19] deli group. It was an introductory meeting based
[20] on my new employment.

[21] Q: And who was that meeting with?

[22] A: Stan Gershenson.

[23] Q: And what was his title?

[24] A: Director of R & D, to the best of my

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[1] Roasted would benefit from having a darker outer
[2] surface," do you see that?

[3] A: Yes.

[4] Q: The Butterball Oven Roasted and Healthy
[5] Choice Oven Roasted, were those existing products?

[6] A: Yes, they were.

[7] Q: At this time — or prior to this survey
[8] being conducted, had Conagra made a decision to
[9] change in any way the Butterball Oven Roasted or
[10] the Healthy Choice Oven Roasted products?

[11] A: I don't know.

[12] MR. SCHROEDER: Can I hear that question
[13] again?

[14] (WHEREUPON, the record was
[15] read by the reporter.)

[16] BY MR. CASTRO:

[17] Q: Who would know the answer to that
[18] question?

[19] A: I don't know. Perhaps my manager at the
[20] time, Deb Billow.

[21] Q: Did you replace anyone in the end of
[22] October of 1997?

[23] A: I don't think not directly. The
[24] position had been open for several months.

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[1] knowledge, Director of Product Development,
[2] something to that effect.

[3] Q: Was he Chris Salm's boss, do you know?

[4] A: No, he was not Chris Salm's boss.

[5] Q: Did you meet with Chris Salm when you
[6] first became employed with Conagra?

[7] A: No, I did not.

[8] Q: When did you first meet Chris Salm?

[9] A: I don't remember.

[10] Q: Did you meet Chris Salm with respect to
[11] this golden brown project?

[12] A: No, I did not.

[13] Q: Did you ever speak with Chris Salm about
[14] this golden brown project?

[15] A: No, I did not.

[16] Q: Did you ever speak with Prem Singh about
[17] this golden brown project?

[18] A: Yes, I did.

[19] Q: When did you first meet Prem Singh?

[20] A: My best recollection is that it was at
[21] one of our project team meetings when I was
[22] introduced to him as the technical resource on the
[23] project team which would have been around the early
[24] part of 1998, a couple months after the date of

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[1] this report.
[2] Q: So would it be fair to say that you met
[3] first with Prem Singh in January of 1998?
[4] A: To the best of my knowledge.
[5] Q: And that was in a project team meeting?
[6] A: Perhaps. It may have been a conference
[7] call or a face-to-face meeting.
[8] Q: And what was he considered within this
[9] project? What did you call him?
[10] A: The technical resource — as part of the
[11] development team, he was the technical resource
[12] part of the project team.
[13] Q: Who made up the project development team
[14] for these products?
[15] A: The project development team versus the
[16] project team, are you asking?
[17] Q: Oh, are there two different?
[18] A: It's just that the product development
[19] team would be one subset of the members of this
[20] launch team or the project team.
[21] Q: Okay. So there is a project team and
[22] then there is a product development team?
[23] A: That's correct.
[24] Q: Who made up the project team, how many

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[1] people? Would they be — you're looking at this.
[2] To try to expedite, that would be the people that
[3] are listed in this distribution?
[4] A: Many of them were on the project team,
[5] however some of these are simply upper management
[6] that needed to be informed or might be interested
[7] in the results of this study.
[8] Q: Okay.
[9] A: So less than ten people would be part of
[10] the project team.
[11] Q: All right. Who makes up the product
[12] development team on this project?
[13] A: I saw it as it was mainly two direct
[14] people which was Stan Gershenson and Prem Singh,
[15] those two people.
[16] Q: And so as you can recall, your first
[17] meeting with Prem Singh would have been about
[18] January of 1998 at a meeting?
[19] A: Yes.
[20] Q: And what was discussed at that meeting?
[21] What was the purpose of that meeting?
[22] A: We just started to get the project team
[23] together to start executing against making these
[24] product changes, and I don't recall the specifics

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[1] of that particular meeting.
[2] Q: What kind of product changes were you
[3] wanting to make to the products?
[4] A: We were moving forward with the
[5] recommendation that came out of the Moskowitz
[6] Jacobs study which was to change the color, make it
[7] be a — a color change and not light. And the
[8] second part of that was also to lower the profile
[9] of the turkey breast so that it was not a ball or
[10] helmet-like shape but lower it a bit which makes it
[11] more natural looking which is something that was
[12] also desired by consumers.
[13] Q: Okay. Anything else? Did you want to
[14] change the texture of the product, make it moister
[15] or anything such as that?
[16] A: We had not made any specific decisions
[17] about that. While we recognized that there were
[18] textural differences that consumers noted,
[19] definitely there are people that like their turkey
[20] breast more wet, and there are people that like
[21] their turkey breast dryer; however, we did not make
[22] a decision at that point and have not — and, you
[23] know, did not throughout the course of this project
[24] to specifically try to make it wetter or drier. We

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[1] were primarily focused on the appearance of the
[2] product.
[3] Q: So as a result of this study, which is
[4] Exhibit 1, Conagra — correct me if I'm wrong —
[5] Conagra decided to change the outer appearance of
[6] the three products — or, excuse me, of particular
[7] turkey products to make the appearance darker in
[8] color, is that correct?
[9] A: Yes.
[10] Q: As well as to make a darker inner
[11] appearance with a more visible grain, is that
[12] correct?
[13] A: I don't recall that piece of it.
[14] Q: Okay. And it also, as a result of this
[15] study, was to lower the profile of the product?
[16] A: Yes.
[17] Q: From helmet shaped to a more natural
[18] looking shape, correct?
[19] A: Correct.
[20] Q: At that time, you hadn't determined what
[21] type of color you wanted on that turkey product,
[22] had you? You just wanted it darker?
[23] A: We had not determined the specific
[24] color, but we had targets or we had examples of

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[1] products that we liked or that we believed
[2] consumers liked that we had an opinion that we
[3] liked as well.
[4] Q: Yes. You had looked at competitors'
[5] product, correct? That's how you got targeted
[6] product?
[7] A: We started by looking at competitive
[8] product and then that was tested in the Moskowitz
[9] study with consumers; so, yes, we used competitive
[10] product along with our own internal product as test
[11] product.
[12] Q: What internal product did you use?
[13] A: We used, of course, the existing
[14] products which were — which an example would have
[15] been the Butterball Oven Roasted which did not have
[16] color, and another example of one of the products
[17] that we tested was a Longmont product which is a
[18] browned product. That Longmont product is a food
[19] service product. It is not one that you would
[20] typically see in a deli. A consumer would not see
[21] that product as a whole piece or sliced piece in a
[22] deli.
[23] Q: But the product that you were going to
[24] produce would also be provided to the food service

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[1] industry, correct?
[2] A: It can be.
[3] Q: And is today, correct?
[4] A: Yes.
[5] Q: Okay. Now, the Longmont product, was it
[6] made — how was it produced, do you know?
[7] A: I believe the Longmont product that we
[8] looked at was oil-browned.
[9] Q: And to make sure we're clear, that
[10] Eckrich Golden Oven Roasted, that's made with a
[11] process, right?
[12] A: Correct.
[13] Q: It's not oil-browned?
[14] A: It is not oil-browned.
[15] Q: Okay. Any other internal product other
[16] than the existing Butterball Oven Roasted and the
[17] Longmont product, any other internal products that
[18] you used?
[19] A: Can I look here?
[20] Q: Oh, absolutely. In fact, anything you
[21] need in there, you look for it.
[22] A: Yes, Healthy Choice Oven Roasted was one
[23] of the products tested.
[24] Q: Which was ultimately replaced with the

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[1] new product, right?
[2] A: Right.
[3] Q: Okay.
[4] A: Yes. And the Butterball Golden Brown
[5] product was also, I believe, an oil-browned
[6] product. We made that product for a specific
[7] customer.
[8] Q: What are you looking at now?
[9] A: I'm looking at page 5 that lists the
[10] stimuli tested. It reads a total of eight products
[11] were tested.
[12] Q: What's the Bates stamp number? Do you
[13] see a number there?
[14] 4928, okay. So that document shows what
[15] products were tested with this survey?
[16] A: That's correct.
[17] Q: That means that's what the consumers
[18] tasted and looked at, right?
[19] A: That's correct.
[20] Q: I see they tested this Boar's Head Oven
[21] Gold?
[22] A: That's correct.
[23] Q: Was that a golden brown appearance?
[24] A: I'm not sure how that's processed. The

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[1] appearance actually has spices on the top. It has
[2] paprika and some other spices that lend color to
[3] it.
[4] Q: The Boar's Head?
[5] A: Correct.
[6] Q: Even though it says Boar's Head Oven
[7] Gold?
[8] A: Yes, yes.
[9] Q: Did you taste this product and view this
[10] product?
[11] A: Yes. Let me clarify. Not this specific
[12] product before this study was done, but, you know,
[13] in the context of my ongoing marketing duties, I
[14] have tasted that particular Boar's Head product,
[15] and it does — it has spices on the top.
[16] Q: Okay. Now, let's look on that page that
[17] we were talking about, this memo. Now, at this
[18] time, I don't see and there is not contained in
[19] here a specific target color and in particular the
[20] color golden brown, true?
[21] A: In this report are you referring to?
[22] Q: Yes, this memo.
[23] A: The Maureen P. Heakin document, that is
[24] correct, she did not set forth an exact description

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[1] of a color or a target color, that's correct.
[2] Q: Now, I see at the bottom, the last
[3] paragraph, I don't understand it, so explain it if
[4] you would. It says, "The recommendation for
[5] Healthy Choice is to use Butterball Golden Brown,
[6] Jewel, or Longmont as reference targets to enhance
[7] acceptability of this new product."
[8] What does that mean, if you know?
[9] A: A minute ago we looked at the page that
[10] had the different products tested that were put in
[11] front of consumers.
[12] Q: Right.
[13] A: And the color of the Butterball Golden
[14] Brown product, which is as I earlier described the
[15] oil-browned product that is made for a specific
[16] customer, i.e., Jewel, was liked better by
[17] consumers because of its outward appearance.
[18] And so the market research person is
[19] recommending in this memo to use that product as a
[20] reference target. She's recommending that we take
[21] our current products and use that as a target to
[22] make ours look — the current products to look more
[23] like the Butterball Golden Brown product.
[24] Q: And you said that's made for a

[1] products that were going to be produced by the '027
[2] Patent not only replaced three products but
[3] resulted in the elimination of a product, is that
[4] correct?
[5] A: Off the top of my head, I don't recall
[6] what product you're referring to that was
[7] eliminated.
[8] Q: The Butterball Caramel, was that
[9] eliminated?
[10] A: Oh, yes, that's correct.
[11] Q: Why was that product eliminated, do you
[12] know?
[13] A: It was in very small distribution. We
[14] didn't think it made sense to have a lot of
[15] different product offerings of different colors,
[16] and again it was in small distribution so it made
[17] sense to focus on our main product, the Golden Oven
[18] Roasted.
[19] Q: I'll refer you to Bates stamp number —
[20] if you go to the back of the document or closer to
[21] the end, it's 05070, that Branded Visual
[22] Performance of the Deli Turkey Breasts, what is
[23] that? What's this document?
[24] A: This is a summary of the data from the

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[1] particular customer. Is that not provided to the
[2] market, to the consumer?
[3] A: Yes, it is. It's made for a specific
[4] customer, but it's in a specific market. It is not
[5] in wide distribution.
[6] Q: And it also says "or Longmont." Is that
[7] the Longmont Oven Prepared breast?
[8] A: Yes, it is.
[9] Q: What color is that Longmont Oven
[10] Prepared breast?
[11] A: That's also a brown, golden brown type
[12] color.
[13] Q: And that's provided and produced to the
[14] consumer, right?
[15] A: That is the product that is primarily
[16] used in food service; but, yes, it is provided to
[17] the consumer ultimately.
[18] Q: How was that product prepared, do you
[19] know?
[20] A: That product is oil-browned, to the best
[21] of my knowledge.
[22] Q: So it's also oil-browned?
[23] A: Yes.
[24] Q: Okay. Now, as I understand, these three

[1] Moskowitz Jacobs study, so this was data, you know,
[2] pulled together from the consumers that were
[3] surveyed.
[4] Specifically when it refers to branded
[5] visual performance, in this particular case, they
[6] put the products out with the labels on or some
[7] reference to the brand. It wasn't a blind test.
[8] So it's basically again ranking each of the
[9] products, those eight products, a ranking of those.
[10] Q: And I notice that — what are these
[11] numbers? For instance, the first column it says
[12] "Boar's Head Oven Gold," and it has "like
[13] appearance overall."
[14] Does that mean 68 is the highest rating
[15] or the lowest rating?
[16] A: Across the competitive set, 68 was the
[17] highest rating.
[18] Q: So the consumer liked the Boar's Head
[19] Oven Gold appearance better than the rest of these
[20] products, is that correct, or at least equal?
[21] No, better than any of the other
[22] products, correct?
[23] A: Well, there has to be a significant
[24] difference, and I don't see — typically they

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[1] note — you can't just look at the numbers relative
[2] to each other. Typically in a market research
[3] document, they note if that's significant or not.
[4] And I'm not following in this particular
[5] document — it seems like a lot of raw data to me.
[6] Q: What market were these three products —
[7] or, excuse me, were these three products intended
[8] to penetrate? The new products, these Butterball
[9] Golden Oven Roasted, the Healthy Choice Golden Oven
[10] Roasted and the Eckrich.
[11] A: The intent was to replace the existing
[12] products that were already in the market, so it was
[13] simply a replacement and where possible gain new
[14] distribution. But initially we simply were
[15] improving the products already in the markets where
[16] they were already selling.
[17] Q: And what were those markets.
[18] Slicable — is it the deli counter, slicable deli
[19] turkey product?
[20] A: Yes.
[21] Q: For deli and for food service?
[22] A: I'm not familiar with the food service
[23] business, to be honest, in understanding how much
[24] of Butterball we sell in the food service business.

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[1] I was specifically responsible for the deli piece.
[2] Q: So as it pertains to the food service
[3] industry, you're not here to testify today as to
[4] the market impact of these three products on that
[5] line?
[6] A: That's correct.
[7] Q: Who is — those are sold into the food
[8] industry, correct?
[9] A: I believe the Butterball Oven Gold and
[10] Healthy Choice are. I'm not sure even about
[11] Eckrich.
[12] Q: Okay. Now, who is it within the company
[13] who could speak to the food service industry side
[14] of this market?
[15] A: The Vice President or the Director of
[16] Marketing for Food Service. His name is Don Mower,
[17] M-o-w-e-r.
[18] MR. CASTRO: Well, Bob, I mean certainly
[19] that's within the scope of this 30(b)(6). You've
[20] provided me financial information as to the food
[21] service side. These products are produced into
[22] that market. They penetrate that market. That's
[23] part of the relevant market, and yet she can't
[24] testify as to that information.

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[1] MR. SCHROEDER: Well, Greg, you gave us this
[2] notice of deposition last Thursday after the close
[3] of business, and we began these depositions two
[4] business days later on Tuesday. I think that we
[5] have done an amazing effort within the very short
[6] time that you've allowed us in producing 30(b)(6)
[7] witnesses in a good faith manner, good, credible
[8] witnesses.
[9] If it's your objective to try to find
[10] some piece of information within these very, very
[11] broad categories that you've defined that the
[12] witnesses that we have for you don't know, I'm sure
[13] that you'll be able to do that. And if we produce
[14] another witness, no matter how hard we try, you
[15] will be able to do that again. That's the way
[16] 30(b)(6) works.
[17] So all I can say to you is why don't you
[18] depose this witness, and then if you can come up
[19] with a list of other things you want to inquire
[20] about, we'll see what can be done there, but
[21] obviously we can't produce another witness today.
[22] MR. CASTRO: You would agree, Bob, that — and
[23] I know we're under a time frame here, and you have
[24] produced these witnesses in good faith. And unlike

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[1] you, I'm not trying to set the ground work for a
[2] variety of motions.
[3] I simply want to make the record clear
[4] that she can't speak as to the market impact of
[5] these products in the food service industry, and so
[6] I would like an agreement on the record that you in
[7] the future will produce someone with respect to the
[8] market impact of these products on the food service
[9] industry. It's clearly within the scope of our
[10] notice, as broad as it may be or as lengthy, I
[11] agree.
[12] But, two, it's certainly relevant to the
[13] claims in this case, and you've certainly had
[14] notice of it. You've produced documents. You have
[15] answered Interrogatories. So if we could have that
[16] agreement either now or at the conclusion of these
[17] depositions, that's fine.
[18] MR. SCHROEDER: Well, I think that the
[19] feasibility of producing additional witnesses at
[20] this point is obviously going to depend upon what
[21] the Judge decides to do with respect to the
[22] scheduling of the case, and I've suggested to you
[23] that we ask for a status conference. And based on
[24] your refusal to do that, we have now filed

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[1] unilaterally requests for such a status conference.
[2] But if what you want to do is conduct
[3] depositions as to every fact which could possibly
[4] be included under these broad categories that you
[5] have noticed, it's obviously not going to be
[6] possible to do that within the time that remains.
[7] **MR. CASTRO:** Well, we've conducted in a day
[8] and a half virtually the examination of virtually
[9] every area other than these market and financial
[10] areas. We started at Noon two days ago, so the
[11] only purpose for the status conference — I was
[12] willing and agreeable to bump the discovery cutoff.
[13] We simply don't want to bump the trial date.
[14] **MR. SCHROEDER:** My feeling is if you are going
[15] to talk about adjusting dates, we need to talk
[16] about adjusting all of the dates. I'm not asking
[17] you to agree to that as a pre-condition. I'm just
[18] asking you to agree to talk to the Judge about
[19] that.
[20] But given the March 1 cutoff date, it
[21] seems to me to be ridiculous for you to serve us a
[22] notice of 34 very broad categories and expect to
[23] get 30(b)(6) witnesses who know every fact that
[24] could fall within any of those categories on two

[1] within the discovery cutoff that we presently have
[2] which is two weeks away.
[3] **MR. CASTRO:** Well, let's finish you sometime
[4] today, and then he and I can address these.
[5] **BY MR. CASTRO:**
[6] **Q:** Why don't you look, ma'am, if you would,
[7] on Bates stamp number 05072. I take it this is a
[8] liking of overall appearance. Now, so these
[9] numbers are just a range. Are they kind of like —
[10] you can't really determine from these numbers which
[11] one has the best appearance, is that kind of what
[12] you're saying?
[13] **A:** Well, in this particular case, it's a
[14] little more — on this page, this 05072, the boxes
[15] around some things tend to highlight more of the
[16] significant differences. It's a little more, you
[17] know — some conclusions may be able to be drawn a
[18] little bit more.
[19] Here this is saying the top — the
[20] Longmont, the Butterball Golden Brown really are
[21] the top two in terms of how they were viewed
[22] visually.
[23] **Q:** Okay.
[24] **A:** The overall appearance liking. So that

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[1] days notice. And I think that the deposition
[2] schedule that we've got and the discovery cutoff
[3] that we've got doesn't permit that even if you want
[4] to pursue it. To simply say that this falls within
[5] the scope of the document request that you filed in
[6] the case, almost everything that happens falls
[7] within that scope.
[8] **MR. CASTRO:** This falls within the notice and
[9] in particular the category to which she's
[10] testifying to today, so you were aware that we
[11] wanted information as to the market impact of this
[12] product on any market that it impacted. That would
[13] be both the deli market and the food service
[14] industry.
[15] So you can talk about the broad
[16] categories. I just — I would like to have an
[17] agreement that you'll produce that person. I won't
[18] move for sanctions for my costs and fees to have to
[19] travel back here unless I file a motion.
[20] **MR. SCHROEDER:** My answer to that is very
[21] simple. If you want to take additional discovery
[22] on specific topics that this witness doesn't know,
[23] I'm not going to depose that, but at the same time,
[24] I don't see how it's going to be possible to do it

[1] 68 score, for example, the Longmont Oven Prepared
[2] breast, it has a blind and a branded score, and
[3] whether it had the brand name on it or not, you
[4] know, the majority of people liked the look of
[5] that.
[6] **Q:** Okay.
[7] **A:** And Butterball was up there as well.
[8] **Q:** All right. I'm going to hand you what
[9] I'll mark — Leslie, can I mark this one?
[10] **MS. NASH:** Yes. I have a copy.
[11] **MR. CASTRO:** Thank you. As No. 2.
[12] **BY MR. CASTRO:**
[13] **Q:** This is the document that was produced
[14] to me this morning. Could you identify that for
[15] me, if you would?
[16] **A:** This is a power point presentation, a
[17] meeting of a project team meeting related to the
[18] Butterball relaunch.
[19] **Q:** When you met with Prem Singh in
[20] January — are there notes kept of those meetings,
[21] these project meetings, memos?
[22] **A:** I can't recall even dates. For larger
[23] meetings that were more formal when we had
[24] management there, there would be a document such as

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[1] this where I would have done a more formal
[2] presentation.
[3] Q: Have you produced all of these notes,
[4] memos? What would you describe this as?
[5] A: Yes, a project agenda or project notes,
[6] formal meetings that were completed. To the best
[7] of my knowledge, I had thought I had produced all
[8] of these when I was earlier requested to give
[9] everything I could about the project.
[10] Q: Are there more of these other than this
[11] one?
[12] A: Yes.
[13] Q: Do they look like this?
[14] A: Many of them are in similar format,
[15] correct, which is a power point presentation.
[16] There may be one or two other ones like this.
[17] Q: This meeting agenda, this was for April
[18] of 1998. Were there meetings prior to this April
[19] 9th, 1998 meeting?
[20] A: Yes.
[21] Q: They would be in this format?
[22] A: Most likely, yes.
[23] MR. CASTRO: This is the first time I've seen
[24] a document like this, so I would ask — we'll look

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[1] with one page to a page, so it just looks a little
[2] different.
[3] Q: In your first meeting that you had with
[4] Mr. Singh, did he tell you what kind of product he
[5] wanted, what color product that he was developing?
[6] A: Meetings that I had with Prem were group
[7] meetings. I don't recall any one on one meetings
[8] that I had with Prem relative to the color.
[9] Q: Okay. What about in a team meeting, did
[10] he ever tell the group what type of color that he
[11] either wanted to produce or could produce?
[12] A: In the context of team meetings, the
[13] process by which we picked the color was such that
[14] the R & D group would present products to us for us
[15] to look at, and a small group of people would
[16] gather around and give their opinion as to if they
[17] liked that color of that or not.
[18] So again the context of this
[19] conversation is again in team meetings. I don't
[20] specifically recall any specific direction that
[21] Prem would have given. It was really done in a
[22] group setting.
[23] Q: Okay. Was it kind of a collaboration —
[24] I was trying to determine what came first, the

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[1] in our files, but this is the first time I've seen
[2] a document that looks like this, and this document
[3] is April of '98.
[4] BY MR. CASTRO:
[5] Q: There are other meetings that precede
[6] this one, correct?
[7] A: Yes.
[8] MR. SCHROEDER: Well, no effort to gather
[9] documents within the scope of the very, very broad
[10] document request that we have got here is ever
[11] going to be perfect.
[12] MR. CASTRO: I agree.
[13] MR. SCHROEDER: So we have found an additional
[14] document, and we produced it.
[15] BY MR. CASTRO:
[16] Q: Would you — if there are others that
[17] precede this and that are after this, would you
[18] produce those to your Counsel?
[19] A: Yes. I'd like to make one comment.
[20] Q: Sure.
[21] A: Visually how it looks is because I
[22] printed two pages to a page. There may be
[23] documents in your possession — I don't know —
[24] that I had previously provided that were this way

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[1] R & D people brought you a product that looked like
[2] the color that they wanted, or is it the marketing
[3] people who said — well, I think you've answered
[4] this. Isn't it the marketing people who came and
[5] said this is the kind of product that the consumer
[6] likes the best, this is the color, right?
[7] A: Right.
[8] Q: Right. And they said please come up
[9] with that color?
[10] A: I don't recall, though — I don't
[11] necessarily believe that that was necessarily the
[12] order. I think there were probably dialogues on
[13] the side as well outside of a group setting where
[14] perhaps work had already been done on certain
[15] things. And it's a collaborative effort where an
[16] R & D will say, hey, here is what we can do, here's
[17] what we've done in the past type of thing, and then
[18] here's existing product. So again it's a
[19] collaborative effort and it takes place over time,
[20] so I cannot pinpoint exactly the process by which a
[21] decision was made.
[22] Q: Okay. Look on this Exhibit 2, the
[23] second box. You're on the first page. Stay on the
[24] first page.

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[1] A: Okay.
[2] Q: It has here — you see down here,
[3] "overall entry strategy: Convert current Oven
[4] Roasted customers, the 27312, to the new, optimized
[5] "browned" product," so you were trying to come up
[6] with a browned product at that time?
[7] A: This document was in April of 1998. It
[8] was after we had already made the collective team
[9] decision on converting the product. I believe the
[10] process and all of that had already been agreed
[11] upon by the group.
[12] This specific meeting, this entry
[13] strategy piece of the meeting, was a sales
[14] execution piece. It was a discussion with sales
[15] management more so than anything. I don't believe
[16] the R & D group was perhaps even at this meeting.
[17] I don't recall.
[18] Q: Okay.
[19] A: It was more of an execution, "hey, now
[20] that we've made this decision, how will this impact
[21] our existing customers when we turn over — when we
[22] change the product, how will that impact it," so
[23] that's what this particular sub-segment of the
[24] meeting was about.

[1] is that box?
[2] A: It's just a title for the presentation
[3] that refers to the group, Armour's of Eckrich Deli,
[4] and BB Relaunch was just Butterball Relaunch, the
[5] name of the product.
[6] Q: You have listed the Oven Roast, and can
[7] you — what does that mean? Is that just the
[8] volume?
[9] A: Yes, and this is for a specific account,
[10] as you can see here, Publix.
[11] Q: I see, okay.
[12] A: So this is a sales execution strategy
[13] document where we sat in a room and said, "okay,
[14] this is what the Publix product line looks like.
[15] Now that we're making a change, here is what we
[16] recommend doing." This was recommended to the
[17] sales team.
[18] Q: And this is you're replacing it with
[19] a — you intend to replace it with the new golden
[20] brown, right?
[21] A: That's correct.
[22] Q: I see. And that's, in turn, true for
[23] Food Lion, there is the same UPC code, right?
[24] A: Correct.

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[1] Q: The second entry is eliminate Brown
[2] #22047. What's that product?
[3] A: That is the Butterball browned product,
[4] the oil-browned product. It was important to one
[5] customer, so we chose to keep it on our product
[6] list. But essentially we wanted to streamline the
[7] product line and not have a lot of different skus
[8] out there with smatterings of volume.
[9] Q: Sure. So was that another product that
[10] was eliminated as a result of the introduction of
[11] the three products produced by the 027 process?
[12] A: No, it wasn't. It was just perhaps
[13] eliminated for certain customers. It was not
[14] removed from the product listing.
[15] Q: But production was reduced, correct?
[16] A: It was recommended to be reduced. I'm
[17] not sure if we followed through, if some of the
[18] smaller accounts actually did end up moving away
[19] from that product to the 27312, the Golden Oven
[20] Roasted.
[21] Q: I guess information we have later might
[22] indicate that, so we'll go on.
[23] On the second page, you have Armour
[24] Swift Deli BB Relaunch, what does that mean? What

[1] Q: And you're also going — what's this
[2] replace with new brown under Food Lion, replace
[3] with new brown? Is that one of the new products
[4] produced from the '027 Patent?
[5] A: Yes.
[6] Q: Well, it says brown and has that UPC
[7] 22047?
[8] A: Yes. Food Lion is the name of that
[9] customer. At that time, their current turkey
[10] product line included a browned 22047, and the
[11] recommendation was to recommend for them to convert
[12] that to the new brown.
[13] Q: And was it converted?
[14] A: I don't know.
[15] Q: What's the name of that product? What
[16] is the name? Does it have one?
[17] A: The name of the existing Food Lion
[18] product at the time was just called Butterball
[19] Brown, I think, browned turkey breast.
[20] Q: Quite a bit of volume, though, right,
[21] 373 million pounds?
[22] A: 373,000.
[23] Q: I'm sorry, 373,000. What does that
[24] represent in sales, do you know?

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[1] A: This particular — oh, in dollars?
[2] Q: Yes, if you know.
[3] A: Take that by \$2.50 or something similar
[4] to that.
[5] Q: It's \$2.50 a pound?
[6] A: Roughly.
[7] Q: How much is this existing 27312, the
[8] Golden Oven, that white turkey, how much did that
[9] cost per pound?
[10] A: Or how much did we sell it, is that what
[11] you're asking?
[12] Q: Yes. What did you sell it to the retail
[13] consumer?
[14] A: It varied by consumer. I just threw out
[15] that \$2.50 as a rough cost.
[16] Q: What's the average cost to the consumer
[17] for the — what was the average cost to the
[18] consumer for the Golden Oven Roasted UPC 27312?
[19] That's that white turkey breast?
[20] A: Right, the original one.
[21] Q: What was the average cost?
[22] A: Are you asking what we charged retailers
[23] or what the retailers charged the consumer?
[24] Q: Both. Wholesale, I guess you would call

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[1] out a really rough number. To the trade was 2.25 a
[2] pound, then it was selling roughly at double that,
[3] 4.50 to 4.99 a pound to the consumer.
[4] Q: Okay.
[5] A: So there is, you know, 50 to 60 percent
[6] increase in margin.
[7] Q: What about the new product, the new
[8] Golden Oven, did you know the cost of that that was
[9] going to replace it?
[10] A: Yes. I don't know the detailed cost
[11] impact. I do know that we anticipated that it was
[12] going to be a cost increase. Browning the product
[13] was going to add cost. On page — we address that
[14] just briefly. This indicates that we didn't even
[15] know at this time how much it was going to cost on
[16] page 4 of my document.
[17] Q: Okay.
[18] A: So 08003.
[19] Q: I see.
[20] A: The breakeven analysis point where it
[21] says if it was a 5 cent hit to us per pound or an 8
[22] cent or a 10 cent, we were estimating what kind of
[23] volume we would have to make up because we were not
[24] increasing the price to the trade. We were going

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[1] it, and then retail.
[2] A: Right. I just have rough — Tim would
[3] probably be in a better position to answer this.
[4] Q: Okay.
[5] A: From a financial standpoint. Are we
[6] supposed to be talking about costs of product?
[7] MR. SCHROEDER: If you know about costs, you
[8] can answer
[9] BY MR. CASTRO:
[10] Q: It will be Tim. I just want to know —
[11] A: I can give you a rough.
[12] MR. SCHROEDER: We're producing Ms. Burns as a
[13] marketing witness and not as a cost accounting
[14] witness, but to the extent that she knows the
[15] answers, I don't object to her giving them.
[16] THE WITNESS: Right.
[17] MR. SCHROEDER: But if we go outside of the
[18] 30(b)(6) notice, obviously she is not a 30(b)(6)
[19] witness.
[20] BY MR. CASTRO:
[21] Q: Right.
[22] A: And the price varies by market. There
[23] is a lot of different programming and things that
[24] impact the price to the trade, but I'll just throw

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[1] to sell Butterball Golden Oven Roasted at the same
[2] price we were selling it before we made this change
[3] to the trade.
[4] Q: And did you, in fact, do that, or do you
[5] know?
[6] A: To my knowledge, we did do that. We did
[7] not take a price increase to the trade.
[8] Q: Now, typically in the market, at least
[9] my experience has been, if you go to the deli
[10] counter, the typically white standard turkey breast
[11] is less expensive than the smoked turkey breast.
[12] Isn't that true?
[13] A: It's hard to say typical because in many
[14] markets and with many customers, depending on the
[15] brand, the flavors in general, whether it's smoked
[16] or some added flavor to it to a protein, you should
[17] typically be able to command a price increase for
[18] that.
[19] Here where we're talking about — it's
[20] still an oven roasted product, whether it's — what
[21] you see in the case, you may be looking at
[22] something else that's driving that cost difference
[23] because it's probably a higher quality product if
[24] it's browned. At that time, it seemed that the

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[1] higher quality turkey breasts had a nicer outer
[2] looking appearance. It varies across retailers.
[3] Q: Okay.
[4] A: Many things are line priced even across
[5] flavors.
[6] Q: I guess from a marketing standpoint,
[7] although the cost was a little bit more for the new
[8] products, you anticipated that your sales would
[9] increase for those products over the products that
[10] they replaced, is that correct?
[11] A: Yes.
[12] Q: And, in fact, they did increase, didn't
[13] they?
[14] A: Yes.
[15] Q: Do you know the increases, or is that
[16] for Tim?
[17] A: Not exactly.
[18] Q: How often did you have those meetings,
[19] these project meetings, did you tell me? Was it
[20] monthly, weekly?
[21] A: We tried monthly. Monthly at best.
[22] Q: And how often would the product
[23] development team be in those meetings?
[24] A: Pretty much everytime. If they couldn't

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[1] be there physically, we would conference someone in
[2] or some representative.
[3] Q: And one of the two would be, in this
[4] case, Prem Singh or Stan Gershenson?
[5] A: That's correct.
[6] MR. CASTRO: Want to take a few minutes break
[7] and that way I will have these documents ready?
[8] (WHEREUPON, a short break was
[9] taken.)
[10] MR. SCHROEDER: Back on the record. I'm
[11] going to give Counsel a document designated CRPF
[12] 8006 which is a letter of February 28, 2000 written
[13] by Dr. Salm to Mr. Hindraker of Alkar, and this is
[14] a letter that Dr. Salm described during his
[15] deposition yesterday, and it appears to me that it
[16] corresponds to the description that he gave.
[17] In addition to that, in view of
[18] Counsel's remarks earlier during the deposition
[19] about what is supposed to be our propensity for
[20] making motions, I wanted to ask if Counsel still
[21] considers it necessary for us to make a motion for
[22] a protective order with respect to the two
[23] categories of the 30(b)(6) notice, numbers 9 and 32
[24] as to which we've made objections?

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[1] MR. CASTRO: I haven't looked at them today.
[2] MR. SCHROEDER: Would you let us know?
[3] MR. CASTRO: Which ones?
[4] MR. SCHROEDER: 9 and 32. Those are the ones
[5] that I told you yesterday that we objected to, and
[6] you asked me whether we were going to make a motion
[7] for a protective order. I don't want to
[8] unnecessarily burden the Court with such a motion,
[9] but if you are going to insist that we make one, I
[10] suppose we have no choice.
[11] BY MR. CASTRO:
[12] Q: Ms. Burns, was this product launch
[13] successful?
[14] A: Yes.
[15] Q: Was it very successful?
[16] A: I'm not sure how you define very
[17] successful.
[18] Q: Make the company a lot of money?
[19] MR. SCHROEDER: Object to the question as
[20] vague.
[21] BY THE WITNESS:
[22] A: I don't know how much money the company
[23] made from this product launch.
[24] Q: Is any product, if you know, made with

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[1] this — browned with the skin on using the '027
[2] process that's sold to the consumer?
[3] A: Any of our products, Conagra's products?
[4] Q: Yes.
[5] A: No, not to my knowledge.
[6] Q: I'm going to hand you what I'll mark as
[7] Deposition No. 3, ask you if you can identify that
[8] for me?
[9] A: Yes, I can. This is a document that
[10] summarizes the results of a study that was done
[11] analyzing what the impact of skin on a turkey
[12] breast does in terms of the cost to the retailer.
[13] Q: Now, I notice here down below, there is
[14] a Butterball Golden. Is that the Oven Roasted?
[15] A: Yes, it is.
[16] Q: And it says cost to retailer, \$2.50 per
[17] pound. Is that the cost of the 27312 product?
[18] A: That number was simply used by me as an
[19] example.
[20] Q: Of what?
[21] A: The product cost could range. I just
[22] picked a number to use as an example in this
[23] particular analysis. So it's a rough estimate.
[24] Q: I mean it has some basis in fact,

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[1] doesn't it? Is that typically what's charged to
[2] the retailer for that product?
[3] A: Yes, within a range, I would suppose
[4] that would be — because I don't know the true
[5] average. That number came from discussions with
[6] salespeople that, hey, we're putting together this
[7] document, let's put together a rough average or
[8] rough number, so that number came from discussion
[9] with the salesperson who would be more familiar
[10] with what we sell, how we price this.
[11] Q: Okay. Within what range is that number?
[12] Is that within 10 cents or 20 cents of the price?
[13] A: 20 cents, I think would be fair.
[14] Q: So the price of your — that you sold
[15] the Golden Oven Roasted to the consumer was between
[16] \$2.30 per pound and \$2.70 per pound?
[17] A: Yes.
[18] Q: And that price changed when you
[19] converted to the Golden Oven Roasted, correct? The
[20] price went up, if you know?
[21] A: Let me step back.
[22] Q: Okay.
[23] A: Can you restate — the 2.50 is what we
[24] would charge within a range to the retailer. Then

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[1] generate similar to the one that you produced today
[2] but it's just a different format, similar to
[3] Exhibit No. 2?
[4] A: A typical meeting or a larger meeting,
[5] the Exhibit No. 2 would have been the actual
[6] meeting document that the group would review
[7] together. This particular document, No. 4, would
[8] have been one where I just summarized what happened
[9] at the meeting primarily for purpose of if people
[10] didn't make the meeting, they at least could
[11] understand the key things we talked about. And the
[12] second reason for having this type of document
[13] would be to reaffirm what people had agreed to do
[14] at the meeting.
[15] Q: Okay. And I see under the second box to
[16] the left where it talks about impact of browned
[17] change on the food service, so you would agree with
[18] me that, consistent with our discussions earlier,
[19] that there was an impact on the food service
[20] industry due to this new product line, correct?
[21] A: Yes.
[22] Q: Okay. Do you know what that impact was?
[23] A: No.
[24] Q: Do you know the volume of product that

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[1] the retailer, in turn, would mark that up to the
[2] consumer. We did not increase that price based on
[3] the change in the process to the retailer. We
[4] kept — they were paying 2.30 before the change,
[5] they were paying 2.30 after. We did not increase
[6] the cost to the retailer.
[7] Q: Okay. We were not on the same page.
[8] Retailer here means the store, so I would consider
[9] that as a consumer of the wholesale price, is that
[10] fair to say?
[11] A: Yes.
[12] Q: Now, go back on that document, if you
[13] would, to 1547.
[14] A: I don't have a 47.
[15] Q: I apologize. That is a different
[16] document. It's this one. Let me mark it No. 4.
[17] Can you identify that document?
[18] A: This document was dated May 11. It was
[19] a document that I wrote up and distributed to
[20] people on the project team that had participated in
[21] a meeting two days earlier, and it summarized what
[22] we talked about at the meeting and talked about
[23] when the next meeting was going to be.
[24] Q: Is this a document that you would

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[1] went into the food service industry from the
[2] product produced by the '027 Patent?
[3] A: No, I don't.
[4] Q: Do you know the gain in market share, if
[5] any, by Conagra due to product produced from the
[6] '027 Patent into the food service industry?
[7] A: No, I don't.
[8] Q: It says here "Butterball, no significant
[9] issues per Paul P." Is he on the food service
[10] side?
[11] A: Yes.
[12] Q: Who is Paul P?
[13] A: Paul Petrolich, P-e-t-r-o-l-i-c-h, I
[14] believe.
[15] Q: And who is Paul Petrolich?
[16] A: He was a business manager or I believe a
[17] marketing manager, business manager, they combined
[18] the roles, at the time working in the food service
[19] business.
[20] Q: Is he still with the company?
[21] A: No.
[22] Q: Now, that says to Butterball. Was he
[23] responsible for the marketing aspects of the
[24] Butterball end of the food service industry?

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[1] A: Yes, at that time, he was.
[2] Q: And what about on the Healthy Choice,
[3] were Lori Saguto and Tom Nestor responsible for the
[4] marketing of those products into the food service
[5] industry?
[6] A: That's correct.
[7] Q: The last page of that document, 06136,
[8] what's that document? I think it was attached —
[9] well, maybe it wasn't attached. I've got three
[10] documents that are attached here, and they probably
[11] shouldn't be.
[12] Let's fix this Exhibit. Let's take
[13] these off. These are a separate document. So
[14] that's just a one-page document, No. 4.
[15] Let me hand you what I will a mark as 5.
[16] Ma'am, can you identify that document. I will
[17] identify it for the record. It appears to be a
[18] memo dated December 3rd, 1997 from you to Deb
[19] Billow regarding poultry project proposed product
[20] strategy and market research plan.
[21] A: Yes. This is a document that I put
[22] together and distributed to my boss with a copy to
[23] Maureen Heakin who was the research person at the
[24] time. It referred to what we were calling a

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[1] segmentation strategy for Butterball.
[2] The discussion or the idea of a
[3] segmentation strategy came out of the findings from
[4] the Moskowitz Jacobs study which not only addressed
[5] the appearance, both outer, you know, color, shape
[6] of the turkey breast, but that study also addressed
[7] the textural qualities of a turkey breast. In the
[8] Moskowitz Jacobs study, it was clear that there
[9] were two different types of consumers out there;
[10] consumers that like a product, turkey product,
[11] that's wet, and consumers that like it as a dry
[12] product.
[13] So this document — the purpose of this
[14] document was to recommend to my manager, and
[15] frankly to the research team, to start talking
[16] about, given that knowledge, did Butterball or did
[17] the organization have an opportunity to look at the
[18] business differently in terms of the textural
[19] qualities of the product, i.e., wet versus dry, and
[20] perhaps there was a way to make changes to the
[21] product line that would deliver those
[22] characteristics to the consumers in a better way
[23] than we were currently do it.
[24] The 27312, which is the Butterball Oven

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[1] Roasted which turned to the Golden Oven Roasted,
[2] the texture of that is more the wet texture. And
[3] the study made us talk about that there was an
[4] opportunity out there to have a drier, firmer
[5] texture product because there are consumers that
[6] like that as well.
[7] Q: That study, along with this thick study
[8] that we introduced earlier, those studies were
[9] conducted in order for the company to have an
[10] opportunity to gain in market share within the
[11] industry, correct?
[12] A: That's correct.
[13] Q: And did, in fact, the company gain in
[14] market share within that industry?
[15] A: Unfortunately we don't have market share
[16] data. We can talk about if our volume went up or
[17] down, but we do not have market share for deli, for
[18] random weight deli meat.
[19] Q: Did your volume go up as a result of
[20] these three new lines? And I guess there could be
[21] actually more lines, but did your volume
[22] increase —
[23] A: The deli volume increased after the
[24] changes were made.

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[1] Q: Could you tell me, ma'am, what the deli
[2] volume was before the changes and then the deli
[3] volume after?
[4] A: I don't have all that data. I think
[5] that would be best for Tim Etzkorn.
[6] Q: Okay. Do you know the percentage of
[7] increase?
[8] A: I can speak to Butterball more. An
[9] estimated range of an increase for the Butterball
[10] volume was roughly between 5 and 15 percent, to my
[11] knowledge, volume increase.
[12] Q: Can you speak — you're talking about
[13] Butterball Golden Oven Roasted?
[14] A: Yes.
[15] Q: Can you speak to Healthy Choice Oven
[16] Roasted?
[17] A: No, I can't.
[18] Q: Or Golden Brown?
[19] A: Because that specific product — I
[20] believe that that specific product also grew. I
[21] don't know what percentage.
[22] Q: Is that something that Tim will know?
[23] A: Yes.
[24] Q: What about the Eckrich Golden Oven

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(1) Roasted, do you know the volume increase?

(2) A: No, I don't know that either. It's a
(3) very small part of the business.

(4) Q: And these increases only are as to the
(5) deli side, correct?

(6) A: Correct.

(7) Q: Do you know the increase in volumes of
(8) sales? These are sales volumes increases?

(9) A: Yes.

(10) Q: Do you know the sales volume increases
(11) for the Butterball Golden Oven Roasted for the
(12) service side of the industry, service side of your
(13) company?

(14) A: No, I don't.

(15) Q: And I would think that answer would hold
(16) true for the other two lines into the food service
(17) industry as well?

(18) A: Yes.

(19) Q: Ma'am, I'm going to hand you what I've
(20) marked as No. 6. Can you identify that for me?

(21) A: Yes, I've seen this document. I believe
(22) my manager at the time, Deb Billow, created this
(23) document or someone that worked for her at that
(24) time. It was several months before I started with

(1) Q: I notice here on the notes to the side,

(2) it says "the new browned will have a more natural
(3) turkey breast shape," and then, two, "the Golden
(4) Brown product is the most premium product we sell."

(5) Did you sell Golden Brown products at
(6) that time that were not oil-browned?

(7) A: I don't believe so. I believe they were
(8) all oil-browned.

(9) Q: Now, when I ask you that question, I
(10) mean not only to the deli market but into the food
(11) service industry, do you know?

(12) A: I'm not familiar with the food service
(13) side of the business.

(14) Q: So you don't know as to the food service
(15) side whether Golden Brown product was sold into
(16) that side that was not oil-browned?

(17) A: Correct. I'm aware of oil-browned but
(18) not any of the alternatives.

(19) Q: I am going to hand you, ma'am, what I'll
(20) mark as No. 7. What is your present job with the
(21) company?

(22) A: My present title is called brand
(23) development manager.

(24) Q: For which brand, any particular brand or

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(1) the company, but what this document does it
(2) describes — it lists out the different product
(3) attributes of the products in the turkey category
(4) that Armour Swift-Eckrich had, the existing items.

(5) So for each one it lists across — it
(6) actually doesn't have the original oven roasted,
(7) 27312. It lists the browned varieties which are
(8) typically oil-browned. These all look like they're
(9) oil-browned.

(10) So it basically lists out there weight,
(11) you know, different physical attributes of the
(12) product, what their shelf life is and what the cost
(13) is, the manufacturer cost.

(14) Q: That's a documented dated March 10th,
(15) '97 before you were employed by the company, right?

(16) A: That's correct.

(17) Q: And I notice this UPC — that's a UPC
(18) code at the top there where it states 30326?

(19) A: That's correct.

(20) Q: And it has Golden Brown. Is that an
(21) oil — that would be an oil-browned product?

(22) A: That's correct.

(23) Q: 27362, is that an oil-browned product?

(24) A: That's correct.

(1) is that for all brands of Conagra products?

(2) A: It's more related to new products, so
(3) it's a new product role.

(4) Q: Is there a new product being rolled out
(5) with respect to the browned turkey breast?

(6) A: There is a new product in the
(7) marketplace in the Chicago market right now and
(8) also in Texas. It's a product line called
(9) McKayla's Kitchen, and it includes turkey in the
(10) lineup. It's a super premium line of many
(11) different proteins. It has hams, turkeys, Italian
(12) specialties, beef. It's a full line. Poultry is
(13) part of the product line.

(14) Q: Is it produced using the '027 Patent?

(15) A: The turkey breasts are made in Longmont
(16) and they're oil-browned. They're not Maillose
(17) browned.

(18) Q: Are all the products produced in the
(19) '027 Patent Maillose browned?

(20) A: I don't know. I really don't know the
(21) technical pieces relating to the patent. I have
(22) not studied it or read it or anything.

(23) Q: Now I'll have you look at Exhibit 7.

(24) Can you identify that document?

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[1] A: Yes. This is a memo dated July 14th,
[2] 1999. It's a report that's a research report
[3] summary. It summarizes the concept. It describes
[4] the home-use test of the Healthy Choice Golden Oven
[5] Roasted turkey breast.
[6] Once we were in the marketplace with the
[7] Healthy Choice Golden Oven Roasted, I believe that
[8] as part of the requirements to have the Healthy
[9] Choice brand, there are certain hurdles that have
[10] to be achieved in order to even carry a product
[11] under the Healthy Choice name. And I believe that
[12] this study needed to be done because we had changed
[13] the product, and we needed to ensure that the
[14] product was at a minimum meeting the product
[15] standards that were previously in the marketplace
[16] with the Oven Roasted Healthy Choice product.
[17] Q: And that's why the Butterball Golden
[18] Oven Roasted and the Eckrich are not included on
[19] this memo?
[20] A: That's correct.
[21] Q: What color is that Healthy Choice Golden
[22] Oven Roasted turkey breast. Is it a brown color?
[23] A: It's a golden brown color. I believe
[24] it's the same as the Butterball Golden Oven Roasted

[1] A: That's correct.
[2] Q: 1998, true?
[3] A: That's correct.
[4] Q: And indeed several of the products that
[5] you looked at in some of these market studies were,
[6] indeed, golden brown in color, true?
[7] A: That's correct.
[8] Q: Indeed you wanted to at least match the
[9] golden brown color from some of your competitors,
[10] true?
[11] A: Depending on which competitor, yes, they
[12] were — we looked again at a range and we had
[13] target competitors that we looked at, yes.
[14] Q: Sure. In fact, even some of their
[15] labels, I notice, and we'll get to that in a
[16] minute, had even on there oven — or golden brown,
[17] true?
[18] A: That's correct.
[19] Q: And even oven golden, I think is on one,
[20] true?
[21] A: That's true.
[22] Q: Ma'am, on the second page of that
[23] document — I'm sorry, was this the third study?
[24] Was this the third study?

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[1] and the Eckrich Golden Oven Roasted. I would
[2] describe it as a golden brown, not real dark, not
[3] light, not as light as if it were just smoked. A
[4] smoked turkey breast has a lighter color and
[5] doesn't have that brownish tone.
[6] Q: Through your experience with the surveys
[7] that were done by the various companies, I
[8] understand there were three, correct?
[9] A: Product testing, is that what you're
[10] describing?
[11] Q: Right.
[12] A: Yes.
[13] Q: In that product testing, it's true, is
[14] it not, that there were other products on the
[15] market that were golden brown?
[16] A: That's true.
[17] Q: And you as a consumer —
[18] A: Or that I might describe as golden
[19] brown, I'm sorry.
[20] Q: Certainly. You as not a marketing
[21] person but as a consumer could look on the deli
[22] cabinet and see they were golden brown, correct?
[23] A: That's correct.
[24] Q: And that would have been in 1997, true?

[1] A: This was actually — you could actually
[2] call this a fourth study if you wanted.
[3] Q: Yes.
[4] A: But this was again done for the purposes
[5] of making sure that the Healthy Choice guidelines
[6] were being met.
[7] Q: Okay. I notice here on the second
[8] page — by the way, are you familiar with the Luhrs
[9] Marketing Research Corporation?
[10] A: Yes, I am.
[11] Q: Were you familiar with them before you
[12] were employed by Conagra?
[13] A: No, I wasn't.
[14] Q: What type of company are they, do you
[15] know?
[16] A: Yes. To my knowledge, they're an
[17] independent research company that focuses primarily
[18] on product testing.
[19] Q: I noticed that in these surveys that are
[20] done, that they get people out into the public to
[21] fill out these forms, right?
[22] A: That's correct.
[23] Q: Do you receive copies of those forms as
[24] part of what they provide to you in the survey?

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[1] A: I'd like to just clarify that there are
[2] many types of methodologies for the surveys. One
[3] might be a questionnaire that's mailed, and in that
[4] case, I would guess that we get tabulations of
[5] everything. I would guess that someone in the
[6] organization would have had all of the backup for
[7] it.

[8] Another way that they conduct the
[9] surveys is what they call CLT, which is central
[10] location tests, where they're interviewing, they're
[11] bringing consumers into, you know, a room, and
[12] there are again documents that tabulate things, and
[13] they still respond I think on paper to things.

[14] Q: Okay. Would you still have — as it
[15] pertains to the first study, the survey we had, and
[16] as it pertains to this one we're now discussing,
[17] Exhibit 7, would you still retain the backup
[18] documentation?

[19] MR. SCHROEDER: I object to the question as
[20] assuming a fact not in evidence. I don't believe
[21] the witness ever testified that Swift-Eckrich ever
[22] had those documents. I am not saying they didn't,
[23] but she didn't testify that they did.

[24] MR. CASTRO: She said they may receive

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[1] A: And there are many research companies
[2] that do this type of thing.

[3] MR. CASTRO: If they are in their possession,
[4] Bob, could we have copies?

[5] MR. SCHROEDER: Let me say for the record that
[6] in gathering these documents, including the
[7] marketing documents, a number of people were
[8] consulted other than the witness, and I would
[9] assume that if these documents existed, they would
[10] have been produced, but we will doublecheck that,
[11] specifically Ms. Nash will do that.

[12] MR. CASTRO: To the extent they do exist, they
[13] will be produced?

[14] MR. SCHROEDER: Yes.

[15] BY MR. CASTRO:

[16] Q: Okay. And again I see on this
[17] background, an objective for the Healthy Choice, if
[18] you look at that page, it stays "standard
[19] plant-produced browned oven roasted product."

[20] At that time, would it be fair to say
[21] that you were looking at a browned oven roasted
[22] product? That was your focus for the Healthy
[23] Choice Golden Oven Roasted turkey breast?

[24] A: What they're referring to in that second

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[1] supporting backup documentation.

[2] MR. SCHROEDER: She said may, and now you're
[3] saying do you still have them. That's a "when did
[4] you stop beating your wife" question.

[5] MR. CASTRO: I don't think it's that harsh.

[6] BY MR. CASTRO:

[7] Q: To the extent that you would receive
[8] that documentation, would it still be retained by
[9] the company?

[10] A: It could be. We'd have to ask — I'd
[11] have to go to the research group and find out. I'm
[12] not sure how long they keep these types of things,
[13] and I am not sure if they even get them, if they
[14] get the surveys.

[15] Q: Were you asked to check as to whether
[16] the surveys were still available that went with
[17] these studies?

[18] A: Was I asked by Bob?

[19] Q: I don't want to know about Bob. Were
[20] you asked to look for those or to obtain copies of
[21] those through the company?

[22] A: No. The typical protocol is that these
[23] are outside independent —

[24] Q: Fair enough.

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[1] point, standard plant-produced browned product was
[2] available because we had already started producing
[3] the Golden Oven Roasted product, so the product
[4] that was tested in this product test was the new
[5] versus old.

[6] Q: Okay. And that's the new product, the
[7] browned product?

[8] A: Yes, I think they're referring to the
[9] new product in that point. I think Maureen Heakin
[10] or Luhrs was referring —

[11] Q: Look on page 7, if you would, with me.
[12] I notice a price here at the top for the Healthy
[13] Choice Golden Oven Roasted, at least what you
[14] conveyed to the consumer. Is that a retail price,
[15] the price that the consumer would pay for that
[16] product?

[17] A: That's true.

[18] Q: And is that the price, if you know, that
[19] is today charged for that Healthy Choice, or is it
[20] more or less?

[21] A: It's within a range again. In market
[22] research testing, we typically make a judgment and
[23] pick a retail number that could vary by market but
[24] one that is reasonable.

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[1] Q: Okay.
[2] A: One that is currently out there within a
[3] range.
[4] Q: And is that, according to this study, an
[5] acceptable price to charge for that product,
[6] according to the study?
[7] A: According to the study, yes.
[8] Q: Okay, thank you. We'll mark your No. 8.
[9] I'd ask if you can identify that?
[10] A: It's a document that again maps out a
[11] lot of different cost implications of the process
[12] of making and browning a turkey breast. And it
[13] lists internal — this is an internal document, and
[14] it lists many of the products, the Healthy Choice
[15] Oven Roasted, the Butterball Oven Roasted, the
[16] browned products that we have talked about
[17] previously. It lists out their UPC numbers, what
[18] the turkey costs are, the ingredient costs, what
[19] happens when you brown the product, what kind of
[20] yield loss you get. It's a technical document.
[21] Q: Is this a document that you used in
[22] determining what product to put out on the market?
[23] A: It's a document that would be used to,
[24] among other things, to help make decisions about

[1] costs are estimated or built for the new product,
[2] that responsibility lies with the research and
[3] development group. However, certainly there are
[4] communications where we understand what the cost
[5] impact is, and we certainly need to understand how
[6] it affects, for example, the fat claims, the second
[7] column from the right, how it might impact the
[8] label. So the marketing person would get involved
[9] in certain aspects of this.
[10] But as the market project leader, I was
[11] not intimately involved with the cost implications
[12] other than knowing that with a cost increase, we
[13] needed to make sure we made up for that.
[14] Q: In regards to this marketing launch for
[15] this new product, how does this fall in relation to
[16] that? It's dated it looks like November 24th,
[17] 1997, so how is this document — is this document
[18] important to understanding the market for the new
[19] products?
[20] A: I think it was probably important in the
[21] context of these were the products that we had
[22] tested, but the testing had already been complete.
[23] So this document was prepared after the testing was
[24] complete. But what it could do is be coupled with

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[1] what the cost impact was going to be and then how
[2] we should address that as we go to market. And it
[3] looks to me like we were assessing our options. We
[4] were looking at the product cost and how it varied
[5] across different browning processes and trying to
[6] get a handle on what the cost impact of browning
[7] products were — is.
[8] Q: And what does this document tell you
[9] about the Healthy Choice Oven Roasted? I don't
[10] understand. It's just one document produced out of
[11] 9,000, and it was a single piece of paper, so I
[12] want to understand what role it plays in your area
[13] of marketing, okay, so that's what these questions
[14] go to.
[15] Is this the existing product and the
[16] cost or the product as will be — the replacement
[17] product produced by the '027 Patent?
[18] A: This was the existing product detail.
[19] Q: Do you have this same kind of document
[20] for the replacement product?
[21] A: No, I don't.
[22] Q: Why not?
[23] A: The process — as the product was
[24] developed, there are different costs — as the

[1] the results of the research.
[2] Q: Okay.
[3] A: And just provides additional information
[4] from which you can make some decisions about how to
[5] move forward.
[6] Q: Who prepares this document?
[7] A: I believe this document came from
[8] someone in the R & D group.
[9] Q: And I notice here the UPC code for the
[10] product that was replaced the Healthy Choice,
[11] 17775?
[12] A: That's correct.
[13] Q: What does this finished cost mean over
[14] here, this 152.53?
[15] A: That basically means it's \$152 to make
[16] that product per 100 weight. So we talk about it
[17] in terms of a 1.52. And we would use that — we
[18] would have to weigh in the distribution costs and
[19] other overhead type costs in order to help us
[20] determine what we should be selling — what the
[21] price should be that we sell to the trade, to the
[22] retailer.
[23] Q: Would this same kind of document be
[24] prepared for the new products produced so that you

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[1] would know what to charge to the retailer?
[2] A: I never saw a document like this that
[3] had a line item that had the, you know, old and new
[4] on it. There were a lot of discussions about the
[5] impact of the cost but not in terms of a detailed
[6] document.

[7] The earlier document referred to, which
[8] was several months later, let's see, Exhibit 2.

[9] Q: Okay.

[10] A: Page 4, so it's 08003, we were talking
[11] about the impact of the increased cost but still
[12] did not know exactly what it was going to be at
[13] that point in time.

[14] So, in effect, we didn't have a detailed
[15] document like this that laid out for us really what
[16] the true cost was going to be.

[17] Q: Did you ultimately have a document like
[18] that that laid out what the ultimate cost for
[19] those products would be and what you should charge
[20] the consumer or the retailer?

[21] A: I personally didn't in the marketing
[22] group. In terms of the way our system works in the
[23] organization, I would guess that costs would be
[24] captured in a system somewhere.

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[1] Q: And I notice here this is the cost —
[2] and maybe this is more for Tim — but down at the
[3] caramel line that's eliminated, 27479, so that cost
[4] will no longer — that will be eliminated? That
[5] was eliminated by this new product line, true?

[6] A: That's correct.

[7] Q: And do you know the volume of that
[8] product that was eliminated, or is that something
[9] better for Tim?

[10] MR. SCHROEDER: Let me just make a statement
[11] on the record. I don't know that there is anybody
[12] within the corporation that has knowledge to break
[13] down that cost the way you're asking for it, so
[14] you're free to inquire of this witness and the next
[15] one as to their knowledge as you were free to
[16] inquire of Mr. Salm.

[17] But if you're looking for us to produce
[18] a witness who says we did a cost analysis as to
[19] this particular part of the production of this
[20] product and here's what it is, I don't think that
[21] exists.

[22] BY MR. CASTRO:

[23] Q: Okay. From a marketing side, was it
[24] important for you to understand and to appreciate a

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[1] cost savings that would be realized by eliminating
[2] a product due to the new product line?

[3] A: Are you suggesting that by eliminating
[4] Butterball, this caramel coated was actually a cost
[5] savings?

[6] Q: Yes.

[7] A: I don't interpret it that way. We made
[8] a business decision to exit a business. There are
[9] a couple of customers that actually sold — we
[10] actually made a decision to eliminate profit. We
[11] actually walked away from a customer that wanted
[12] that specific product because we didn't want to
[13] make it anymore because we wanted to streamline and
[14] have more products that had similar processes.

[15] So we actually walked away from a
[16] business that actually brought money. I don't know
[17] if we actually converted that — if we actually
[18] went to customer X that had that product and said
[19] but, hey, we have this other product. That was the
[20] intent. The intent was to convert them to the new
[21] so you replace the business.

[22] Q: And, in fact, the intent for this whole
[23] marketing approach was really two fold; one to
[24] introduce the new products on the market, encourage

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[1] your customers to keep this new product because
[2] it's simply a replacement for an old, true? And
[3] then second to encourage them, though, to keep the
[4] oil based products so the products produced by this
[5] oil type cooking, true?

[6] A: No, I wouldn't agree with that. If a
[7] customer carries the oven roasted, they typically
[8] don't carry the oil-browned, too. So the overall
[9] goal was to we improve the product, we wanted to
[10] keep our current customers happy and convert them.

[11] In the case where there were some
[12] oil-browned products, when it was a large customer,
[13] we chose to stay in business with them because they
[14] really wanted that particular product. But, for
[15] example, in the caramel case, there wasn't a big
[16] business there and they didn't carry oven roasted.
[17] We wanted to have them leave that business and move
[18] to the other. I'm not aware of a situation where
[19] they carried both, the caramel and the OR.

[20] Q: I am going to hand you what I'm going to
[21] mark as No. 9, ask if you can identify that? The
[22] title is a Golden Oven Roasted Turkey Breast — or
[23] Introducing Golden Oven Roasted Turkey Breast, and
[24] it's quite voluminous.

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[1] A: It looks like it's a multitude of
[2] documents from a binder that we delivered to our
[3] salespeople at the time that we launched these
[4] product changes. And the binder includes things
[5] that the salespeople would find useful in helping
[6] to go in and talk to their customers and sell to
[7] their customers.
[8] Q: Okay.
[9] A: So it includes various documents.
[10] Q: And I apologize if it makes up more than
[11] one. I think it came to us maybe as what appeared
[12] to be one document, and I guess that's because it's
[13] in a binder that a salesperson would have.
[14] A: That's correct.
[15] Q: Okay. And this is a document prepared
[16] by Conagra by the marketing group?
[17] A: Correct.
[18] Q: By your group?
[19] A: That's correct.
[20] Q: And you give it to the salesmen in order
[21] to explain to them the new products produced by
[22] this process, correct?
[23] A: That's correct.
[24] Q: Explain to them the value of the new

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[1] this product?
[2] MR. SCHROEDER: Object as vague.
[3] BY MR. CASTRO:
[4] Q: Have the products been a huge success?
[5] A: Overall I believe it was a success.
[6] Q: Was it a huge success?
[7] MR. SCHROEDER: Object as vague.
[8] BY MR. CASTRO:
[9] Q: You can answer it.
[10] A: I gave some ranges before on, you know,
[11] how our volume was impacted, and Tim will talk to
[12] you about that, so I guess it just depends on how
[13] you define —
[14] Q: Well, in your opinion, was it a huge
[15] success based upon the volume increases? I mean
[16] you've been in this business several years. Would
[17] you define it as a huge success?
[18] A: I think for our organization it was a
[19] huge success.
[20] Q: Thank you. Look on the second to the
[21] last paragraph. Do you agree with his statement
[22] where it says, "In short, we have a super new
[23] product and all of the information and marketing
[24] support to make this the biggest news in our

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[1] products, true?
[2] A: That's correct.
[3] Q: Explain to them how to sell the product,
[4] true?
[5] A: That's correct.
[6] Q: Who is Richard Goodman? Is he the Vice
[7] President of Sales for the company?
[8] A: Yes, at that time, he was.
[9] Q: Is he still the vice president?
[10] A: No, he's not.
[11] Q: Is he still with the company?
[12] A: No, he's not.
[13] Q: Do you know where he is now?
[14] A: He is at Smithfield. He works for
[15] Smithfield.
[16] Q: At the first page, or keep going past
[17] these pictures, you see where it talks about this
[18] Golden Oven Roasted Turkey Breast and that it's a
[19] huge success?
[20] A: In the memo, it's Rick addressing people
[21] in his organization at the time which were
[22] salespeople. He's saying here is everything you
[23] need to know to ensure that this is a huge success.
[24] Q: Oh, I agree. Was it a huge success,

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[1] industry?" Do you agree with that statement?
[2] A: Not particularly.
[3] Q: Why?
[4] A: I think that's a little sales fluff
[5] going on there.
[6] Q: Is it?
[7] A: Yes.
[8] Q: Go, if you would, ma'am, it's not
[9] numbered but it's Bates stamped 7545. It's a few
[10] pages in.
[11] A: Okay.
[12] Q: Now, I want to make sure we have all the
[13] product produced at the process, and I'm not sure
[14] because you mentioned that Food Lion may have
[15] purchased product produced by the process.
[16] A: Food Lion was an oil-browned product.
[17] Q: It was an oil-browned, I'm sorry.
[18] A: Yes, it was an existing product.
[19] Q: Okay. Are these the three products
[20] then?
[21] A: Yes.
[22] Q: The Butterball, the Healthy Choice,
[23] Eckrich?
[24] A: Yes.

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[1] Q: And indeed did production begin in late
[2] '98, early 1999?
[3] A: Yes.
[4] Q: Let's go to the next page. I see at the
[5] top, "What are the highlights of the production
[6] process?" It says, "The improved Oven Roasted
[7] products are now golden browned in the oven using a
[8] patented process for a home-roasted appearance
[9] consumers prefer."
[10] As a marketing person within the
[11] company, is that a good sales approach is to tell
[12] your retailers that we've got a process that's
[13] patented?
[14] A: I think we felt that it was a relevant
[15] point. I'm not sure I would say that it was
[16] intended to be put out there as a key selling
[17] point.
[18] Q: But it was a selling point?
[19] A: Yes.
[20] Q: And indeed it has some value to be able
[21] to tell your retailer that we have a patent on this
[22] process that makes this good product, true?
[23] A: I would agree with that.
[24] Q: Would you agree that it helps your sales

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[1] very nice.
[2] Q: Because at that time, the only product
[3] you had was that white product?
[4] A: That's correct.
[5] Q: That was the only product that was
[6] competing with your competitors?
[7] A: Correct, at least under our key brands
[8] like Butterball and Healthy Choice, that's correct.
[9] Q: What you were trying to accomplish, were
[10] you not, was the ability to be able to tell the
[11] consumer or the retailer that what you now had was
[12] a product that looked home-roasted?
[13] A: Closer to that, that's true, yes.
[14] Q: Yes. I think Chris Salm yesterday said
[15] we could take the turkey out of the oven, you
[16] wanted that look?
[17] A: That's true.
[18] Q: And other competitors already had that
[19] look, true?
[20] A: Some did, yes.
[21] Q: Now, if Chris Salm yesterday testified
[22] that the Eckrich brand was oil-browned, he was
[23] mistaken, wasn't he?
[24] A: Yes, it was part of this product launch,

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[1] to tell these retailers that we are able to produce
[2] a product that others can't unless they pay us
[3] money to produce the product with our process?
[4] MR. SCHROEDER: Objection, calls for
[5] speculation.
[6] BY MR. CASTRO:
[7] Q: If you know.
[8] A: My opinion is that we improved this
[9] product by changing the color, but frankly other
[10] people — there were already better looking turkey
[11] breasts out there.
[12] Q: There were other turkey breasts that
[13] already had the golden brown?
[14] A: Right. I mean the reason that I
[15] referred to, you know, in Rick's earlier memo when
[16] it sounded like a bit of an embellishment because,
[17] frankly, it just seemed like the right thing to do
[18] was to improve the appearance of our product. It
[19] was just the right thing to do.
[20] Q: You wanted to improve the appearance of
[21] the product in order to be competitive with other
[22] products on the market, true?
[23] A: Yes, and to make our products more
[24] appealing to consumers. Our product didn't look

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[1] yes.
[2] Q: Now, go, ma'am, if you would to 7548.
[3] It's about two or three pages away. I want to try
[4] to speed this up. It says the ingredient
[5] statement. When you use the Maillose, it doesn't
[6] change the ingredients on the package?
[7] A: It didn't change the individual words
[8] that make up the ingredient list except to the
[9] extent where we added this 2 percent or less than.
[10] Q: Okay. And the UPC codes did not change,
[11] true?
[12] A: That's correct.
[13] Q: And again the next page confirms what I
[14] asked you before, and I believe your answer at the
[15] top, Butterball Caramel was discontinued effective
[16] June 1st, 1999. Did that, in fact, occur?
[17] A: Yes.
[18] Q: Now, the second paragraph is why I asked
[19] you the questions earlier. It would appear that
[20] what you attempt to do in this market is sell both
[21] a product that is produced by this new '027 patent
[22] but encourage the consumer or the retailer to buy
[23] the oil-browned product? Isn't that what this
[24] second paragraph states?

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[1] A: What this was trying to do — what it
[2] states is first it just says "What's the difference
[3] between Golden Oven Roasted and oil-browned?" This
[4] was trying to help the salespeople be able to
[5] address with a customer we do — we did have two
[6] products at the time. We had the Golden Oven
[7] Roasted and in some retailers we had oil-browned.
[8] We were trying to promote the Golden
[9] Oven Roasted and have that be really our main stay
[10] out there. But in some cases, certain retailers,
[11] that was the Food Lion and the Jewel, was happy
[12] with what they had and didn't necessarily want to
[13] convert.
[14] Q: It says here, "What is the difference
[15] between Golden Oven Roasted and oil-browned? Why
[16] should I carry both?" So you are trying to tell
[17] your salespeople you tell the retail this is why
[18] you carry both?
[19] A: Only in the cases where they did carry
[20] both and really wanted to keep both. We were
[21] trying to hold business where we could. We were
[22] not trying to encourage the sale of oil-browned
[23] products, to my knowledge.
[24] There is a difference in terms of the

[1] was not maillored.
[2] Q: Where was that produced?
[3] A: I believe that was produced in
[4] Jonesboro.
[5] Q: Was that made with the '027 Patent
[6] process?
[7] A: No, it wasn't. It was white. So the
[8] thinking there was just, hey, if they really don't
[9] want Golden Oven Roasted, maybe they want to have
[10] the white low salt one.
[11] Q: Do you know what it means at the end
[12] where it says "your retailer should stock both?"
[13] A: Yes. What that meant was even for
[14] retailers who did get their product converted, so
[15] now they have the Golden Oven Roasted, they really
[16] should have the low salt anyway because of the
[17] market need that that serves.
[18] Q: Go a couple pages later to 7551, price
[19] and slotting. It says, "There are no price
[20] increases specifically related to the golden Oven
[21] Roasted product enhancements." Were those prices
[22] increased?
[23] A: To my knowledge, they were not. The
[24] prices held.

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[1] taste and what it delivers because of the different
[2] processes, and certain retailers like the Food
[3] Lion, for example, they really liked that
[4] roasted — more oil. It does have a little bit
[5] oily of a taste.
[6] Q: Now, the last paragraph there, "What if
[7] my customer absolutely refuses to accept the
[8] replacement of Golden Oven Roasted for all-white
[9] product?" You state there "Since the Golden Oven
[10] Roasted is a replacement product, the current OR
[11] product that we know today will no longer be
[12] available," true?
[13] A: That's correct.
[14] Q: Now, in certain cases, as it states
[15] here, Butterball low salt turkey breast may be
[16] positioned as a substitute. What's that?
[17] A: What that is all about is that if
[18] someone really wanted — the old oven roasted
[19] product was essentially the white helmet-like
[20] product. If a customer really wanted their product
[21] white, they really didn't want it despite all the
[22] things that were going on, they really wanted to
[23] keep the white product, we also had in our line a
[24] low salt turkey breast that was still white. It

[1] Q: What does slotting mean?
[2] A: Slotting, what that means it doesn't
[3] really pertain very much to the deli world. But in
[4] other parts of the grocery store, manufacturers
[5] have to pay retailers for the space. And so if
[6] they're putting a new product in, they typically
[7] have to give the retailer extra money. It's just
[8] disguised as slotting.
[9] Q: Okay.
[10] A: In the deli industry, that doesn't
[11] typically come into play.
[12] Q: Let's go to 7558, if you would. Golden
[13] Opportunity. Unfortunately I meant to ask for a
[14] color copy and got too tied up, but I meant to call
[15] Howard. I wanted to ask you here would you agree
[16] with these statements that Oven Roasted breasts
[17] account for the majority of poultry pound sales?
[18] Do you agree with that?
[19] A: The data that we do have — as I
[20] mentioned earlier, we don't have scan data because
[21] this is random weight product sold out of the deli.
[22] However, we did buy — there is a manufacturer or a
[23] vendor called Deli-Scan who makes assessments of
[24] what the market sizes are for things for total

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[1] poultry, total ham, that type of thing, and we did
[2] buy data from this company called Deli-Scan for
[3] many years. And they tell you, based on their
[4] interactions with retailers and the numbers that
[5] they get from retailers, the data from them shows
[6] that out of the total turkey category, over half of
[7] it is just oven roasted.
[8] Q: Right. And do you agree with these
[9] numbers? Do you have anything that disagrees or
[10] that refutes these numbers?
[11] MR. SCHROEDER: Objection, compound.
[12] BY MR. CASTRO:
[13] Q: Do you have any information within
[14] Conagra that refutes these numbers?
[15] A: No.
[16] Q: Do you have any information within
[17] Conagra that — excuse me. Do you agree with these
[18] numbers?
[19] A: I believe they're directional. I would
[20] agree with them directionally. So whether it's —
[21] for example, it says Oven Roasted breasts have
[22] consistently driven the majority of poultry growth
[23] up 14 million pounds. Maybe it wasn't really 14.
[24] Maybe it was 12, maybe it was 16, but I believe

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[1] that directionally out of the turkey market, Oven
[2] Roasted does drive the majority of the volume just,
[3] you know, from knowledge of our shipments, our
[4] sales, and knowing the competitive situation.
[5] Whether these exact numbers are right, I
[6] would agree with the statement that — I would
[7] agree with this generally.
[8] MR. CASTRO: Okay. Bob, can I get a copy, a
[9] color copy of this?
[10] MR. SCHROEDER: Sure.
[11] MR. CASTRO: For trial.
[12] BY MR. CASTRO:
[13] Q: Let's flip several pages, if you would.
[14] MR. SCHROEDER: Off the record for a second.
[15] (WHEREUPON, a short break was
[16] taken.)
[17] BY MR. CASTRO:
[18] Q: Go, if you would, ma'am, to 7567. Well,
[19] I'm sorry, go back. I think that's important,
[20] 7559. You had that page.
[21] Does that show an increase in sales?
[22] What does that show?
[23] A: What that was showing was in the deli
[24] meat world, that within poultry, flavored poultry

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[1] is starting to gain in popularity. That includes
[2] smoked products, honey and other things, maybe a
[3] pepper turkey breast or something like that.
[4] That just shows that over time, there is
[5] an interest in poultry items other than just oven
[6] roasted.
[7] Q: Yes. Indeed from 1993 to 1997, honey
[8] sales increased from — was that 40 million to,
[9] what, maybe 55 million?
[10] A: Right.
[11] Q: Okay. And then smoked, from '93 to '97,
[12] increased from, you know, what, 68 million possibly
[13] up to over 90 million, true?
[14] A: That's correct, based on this Deli-Scan.
[15] This is according to again this market data that we
[16] bought.
[17] Q: Do you have any information within
[18] Conagra that refutes those numbers?
[19] A: No, I don't.
[20] Q: Do you generally agree with these
[21] numbers?
[22] A: Yes, I do.
[23] Q: I see the low salt — the next page, the
[24] low salt turkey breast business. Were any of these

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[1] products that are produced by the '027 Patent
[2] considered to be a low salt turkey product?
[3] A: No, not to my knowledge.
[4] Q: So that's not as relevant or doesn't
[5] pertain really to the products being launched, does
[6] it?
[7] A: No, it doesn't.
[8] Q: What about the nutritional value of the
[9] product? Was that a selling point for this
[10] product?
[11] A: We actually added fat by introducing the
[12] browning process, but we weren't concerned about
[13] that for a couple different reasons. Because
[14] turkey is — one reason is that turkey is perceived
[15] by consumers to be already inherently healthy, and
[16] people are starting to — we believe that the
[17] trends were more towards flavor and concern about
[18] flavor and less about the complete absence of fat.
[19] So our claims on our — on these
[20] products that we're talking about, both Healthy
[21] Choice and Butterball, there were increases —
[22] there were small amounts of fat added, so our label
[23] claims changed from fat free to 98 percent fat
[24] free.

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[1] Q: Okay. Go to 7567 now, if you would. If
[2] you look at the competitors, are those people who
[3] you — competitors whose products you looked at
[4] such as Boar's Head, Sara Lee, Dietz & Watson,
[5] Alpine Lace?
[6] A: Yes.
[7] Q: Now, when you produced these — did Prem
[8] Singh see this marketing information?
[9] Let me ask you this. Was this type of
[10] information shared in these product meetings?
[11] A: Yes.
[12] Q: And so that those that attended those
[13] meetings within research and development would know
[14] the different products that you were testing?
[15] A: Yes. I believe we provided all the
[16] backup and that type of thing to everybody in the
[17] group.
[18] Q: Let's go to 7578. I refer you to that
[19] page just for clarification. It says, "Current
[20] Oven Roasted, the New Golden Oven Roasted," and I
[21] only see the two UPC codes for the Butterball and
[22] the Healthy Choice. I don't see the Eckrich. Do
[23] you know why?
[24] A: Yes. It's a simple reason.

[1] markets also do vary based on the fact that the
[2] Healthy Choice appeals to a consumer that's more
[3] health conscious, so there are regional
[4] differences.
[5] Q: I guess what I mean is — I didn't ask
[6] it very well. But the products produced by the
[7] '027 Patent, the products being the Butterball
[8] Golden Oven Roasted and the Healthy Choice Golden
[9] Oven Roasted, you were able to sell both products
[10] to the same retailer and be able to explain to them
[11] why they should buy both of those products, true?
[12] A: Yes.
[13] Q: In fact, your sales material says that
[14] at 7587, if you look, it says "stock both
[15] Butterball and Healthy Choice Golden Oven Roasted
[16] Turkey Breast, true?
[17] A: That's true.
[18] Q: So would it be true also that this would
[19] increase your ability to — this was an attempt to
[20] increase your market share within the turkey
[21] market?
[22] A: Yes, it was. I want to just clarify,
[23] though, that I think the intent, as I wrote it,
[24] beyond this sales deck was that for retailers who

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[1] Q: Okay.
[2] A: This was a sales presentation document
[3] put out on a CD rom for people in the sales force
[4] to use, and frankly we weren't selling and we still
[5] probably don't sell very much of the Eckrich item.
[6] So the presentation was really focused
[7] on Butterball and Healthy Choice, and I believe
[8] somewhere even in the sales deck, I said to people
[9] if you're interested in getting a document for
[10] Peter Eckrich Deli, talk to me, and I'll help you
[11] out with that. But again we weren't in big
[12] distribution on Eckrich. It's a small business.
[13] We didn't provide special decks for the people to
[14] use in selling with their retailers.
[15] Q: And I guess within the Butterball and
[16] Healthy Choice, I mean those aren't distinct
[17] markets, are they?
[18] A: Actually they are. This sales deck, I
[19] should clarify, I believe there were pages — there
[20] were pages where a person could take the bulk of
[21] the deck and use it and then add and custom it,
[22] whether it would be Healthy Choice or Butterball.
[23] And many times there are crossovers
[24] between Butterball and Healthy Choice, but the

[1] already carried both, this was explaining the
[2] changes to them.
[3] I'm not aware that we had a specific
[4] drive out there to increase Healthy Choice and
[5] Butterball together because of this. It was really
[6] addressed to people who already carried the
[7] product. We didn't have established distribution
[8] goals for new — you know, getting new retailers.
[9] A lot of this was an explanation to the existing
[10] retailer.
[11] Q: Did you find that the launch of these
[12] products, though, did increase your market with
[13] customers who had previously carried both products?
[14] A: I can't speak to that. Again we don't
[15] have distribution information even. We can look at
[16] shipment data. So someone maybe in the sales group
[17] could address that. But my impression was that
[18] essentially where we had existing business, that
[19] perhaps grew as opposed to that we gained a lot of
[20] new distribution out of this.
[21] Q: So Conagra doesn't obtain scan data?
[22] A: That's correct. In this category, it's
[23] not available.
[24] Q: I see.

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[1] A: Because it's random weight. When
[2] consumers go check out, many times the same number
[3] goes out there whether you're buying turkey, ham.
[4] It's just not captured to that proper level. I
[5] think the industry is moving in that direction, but
[6] it's not like the packaged good side of the
[7] business.
[8] Q: Go to 7614, if you would. That's a
[9] competition section overview, isn't it?
[10] A: Yes, it is.
[11] Q: Did you prepare this document?
[12] A: Yes, I did.
[13] Q: Those were some of the competitors that
[14] you looked at their product?
[15] A: That's correct.
[16] Q: When did you look at their product, do
[17] you know?
[18] A: It was done over the course of all this
[19] work starting with the Moskowitz Jacobs study was
[20] when I got involved.
[21] Q: And what these documents entail, and
[22] correct me if I am wrong, you actually looked at
[23] the packaging, looked at the color of the product,
[24] and then made a diagram of important factors, is

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[1] that true?
[2] A: That's true.
[3] Q: If you would go now to 7618, and as you
[4] look at that, the reason why you did that is you
[5] wanted to observe and verify different product
[6] names, different characteristics of the product,
[7] true, and that would be of your competitors?
[8] A: Yes.
[9] Q: Okay.
[10] A: With the purpose of helping the
[11] salespeople be able to talk to our product.
[12] Typically when they go in and they're talking with
[13] a retailer and they would cut our product against
[14] someone else, it helps them to be able to speak
[15] to —
[16] Q: Sure. Before you launched this product,
[17] you became very aware of the competitors' products?
[18] You knew the color, you knew their ingredients, you
[19] knew what their packaging display, true?
[20] A: Yes.
[21] Q: And that would be true of all of these
[22] that you've listed in 7618?
[23] A: That's correct.
[24] Q: What is the number 1? What are these

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[1] numbers beside that? Are those degree of
[2] importance? I know you explained it earlier.
[3] A: Those are the order that they're on the
[4] label. And on any ingredient label, the order will
[5] tell a consumer if that's the primary ingredient or
[6] not, so obviously it's great for a turkey breast to
[7] be the primary ingredient versus water.
[8] Q: Sure. Let's go to 7620. Is that a
[9] similar type of document, front panel product
[10] claims summary?
[11] A: Yes.
[12] Q: I notice that you put Boar's Head
[13] Ovengold Roast. So you put the name. It's
[14] Ovengold, right?
[15] A: That is the name on their package,
[16] right.
[17] Q: Over at Claim 5, it's Ovengold Roast.
[18] What does that mean?
[19] A: What this chart is it just lists the
[20] competitive items going down the side, and the
[21] different claims are just descriptive words pulled
[22] off the package, and we just called them Claim 2,
[23] Claim 2, Claim 3 just to help us see who was making
[24] a whole bunch of claims and again to help the

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[1] salespeople.
[2] So, in this case, the Boar's Head
[3] Ovengold Roast, one of their claims was about that
[4] they have lower sodium. One was that they're high
[5] in proteins down the road. I think Ovengold Roast,
[6] we called that a claim, I think — we called it a
[7] claim just because it's a descriptive term to
[8] describe the turkey breast.
[9] Q: And it's even on their labeling, isn't
[10] it?
[11] A: Yes, it is.
[12] Q: Below on Willow Brook Farms, do you see
[13] that fourth from the bottom?
[14] A: Yes.
[15] Q: What's Claim 2 mean? Because under
[16] that, it has Golden Brown?
[17] A: Yes, it's pretty much the same I think
[18] as Ovengold.
[19] Q: Is that the color of the product, or is
[20] that what's displayed on the packaging?
[21] A: It's displayed on the packaging. It's
[22] how they describe the product. It's a descriptor.
[23] Q: And this information was shared with the
[24] people that are involved in the project team?

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[1] A: Yes, we looked at it along the way. If
[2] there was a company who made a competitive product,
[3] the label would be there. I can't say that
[4] everybody on the team would have — the R & D group
[5] would have gotten a binder as a courtesy copy when
[6] we gave it to everybody. I'm not sure if Prem
[7] Singh specifically looked at each page of this.
[8] Q: Was Prem Singh at any of the cuttings of
[9] the other competitors products?
[10] A: I don't remember who was at all the
[11] cuttings.
[12] Q: Tell me what occurred at a cutting, if
[13] you would?
[14] A: A typical cutting in Conagra in the deli
[15] group would be fairly informal. You might get a
[16] notification on an e-mail that we're taking a look
[17] at turkey breasts today. It could have been a
[18] little more formal in something maybe I prepared a
[19] little more in advance and had an agenda and
[20] planned it out a little bit more ahead of time.
[21] But essentially you'd go into the
[22] kitchen and you would have competitive product
[23] there. There might be a whole piece in a bag and
[24] then another piece sliced, and for whatever the

[1] agree directionally with the numbers. It's the
[2] best data that we had at the time.
[3] Q: Okay. Does Conagra have any information
[4] that refutes the numbers that are contained on that
[5] page?
[6] A: No.
[7] Q: Look at the next page, if you would,
[8] please, do you generally agree with the information
[9] contained on that page?
[10] A: Yes.
[11] Q: And are you aware of any information
[12] that Conagra has which would refute that
[13] information?
[14] A: No.
[15] Q: Same for the next page?
[16] A: 7670?
[17] Q: Yes, ma'am.
[18] A: Yes.
[19] Q: Do you agree with that information?
[20] A: Yes.
[21] Q: Would the market of your product be
[22] impacted if your retailers learned that the product
[23] produced from this '027 Patent, that indeed the
[24] patent was not valid? Would the retailers be

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[1] purpose of the cutting is, people would gather
[2] around and talk and try to address what the
[3] objective of the cutting was.
[4] Q: Would they fill out a form?
[5] A: In many cases, yes, they may fill out a
[6] form. You know, that's more typical now than it
[7] was five years ago.
[8] Q: Okay. Would they look at the color of
[9] the product?
[10] A: Depending on the objective of the
[11] cutting, yes, there would be on a form perhaps
[12] different attributes being looked at, whether it's
[13] the color, texture, and you get the people to rate.
[14] Q: Okay. Look at 7668, if you would. If
[15] you would read those statements, my question will
[16] be do you agree — generally agree with the
[17] statements contained on that page?
[18] A: This page describes — again it's part
[19] of a sales document, a sales story. It reads,
[20] "Meats are a vital component of your service deli
[21] business," and then it gives numbers.
[22] Q: Do you generally agree with the numbers
[23] that are contained on that page?
[24] A: As I mentioned earlier, Deli-Scan, I

[1] affected by that? Would that discourage their
[2] purchase of the product?
[3] A: I don't think so.
[4] Q: And what do you base that opinion upon?
[5] A: Just my opinion. To my earlier point in
[6] terms of making this type of change, we weren't
[7] driving innovation. We were followers. And I
[8] think the retailers — in my opinion, the retailers
[9] are interested in delivering product that the
[10] consumers believe is better and more appealing
[11] looking, and other people brown products. There is
[12] different browning methods. I'm not sure they care
[13] is my honest opinion.
[14] Q: Sure. You don't know how much your
[15] market share has increased within this area?
[16] MR. SCHROEDER: Objection, assumes a fact not
[17] in evidence.
[18] BY MR. CASTRO:
[19] Q: Well, you have indicated that your sales
[20] volumes have increased?
[21] A: The only thing that I can speak to is
[22] volumes, and I can't even speak to those in detail
[23] percentages. But, you know, Tim could probably do
[24] that. But market share, again we don't have that

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[1] information. We don't know if our increase in
[2] volume was simply it could be related to the
[3] marketing work we did at the time, it could be a
[4] function of something a competitor was doing or not
[5] doing right.
[6] We, unfortunately, in our world of deli,
[7] we don't have good information to assess market
[8] growth. We don't even know if it grew, let alone
[9] how it grew and what was driving that.
[10] Q: Okay. Just so we can attach it, I'm
[11] going to for the record make one last Exhibit.
[12] This is another survey. This is an earlier survey
[13] done by Luhrs, September of 1998. It's No. 10.
[14] Can you identify that for me?
[15] A: Yes. This is the third research study
[16] that's referred to in all of the sales materials
[17] which was taking the new Butterball Golden Oven
[18] Roasted and testing it against competition.
[19] Q: And I notice in this survey, the
[20] information provided to Luhrs on the second page,
[21] what seems to be their focus is to obtain — talk
[22] to the consumer about an Oven Roasted Turkey Breast
[23] and whether the consumers' acceptance of that would
[24] be enhanced due to a darker outer color. Do you

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[1] process?
[2] MR. SCHROEDER: Objection, calls for
[3] speculation, lacks foundation.
[4] BY MR. CASTRO:
[5] Q: Do you consider the '027 process
[6] valuable in relation to your ability to market the
[7] products that are sold to the retailers?
[8] MR. SCHROEDER: Same objection.
[9] THE WITNESS: So I don't have to answer that?
[10] MR. SCHROEDER: If you have an answer, go
[11] ahead.
[12] BY MR. CASTRO:
[13] Q: Yes, if you know.
[14] A: My personal opinion I think it was
[15] valuable because it delivered on a physical
[16] attribute that was appealing to consumers.
[17] Q: Right. And it's true you're able to
[18] sell a product at a very competitive price that
[19] would compete with the other products on the
[20] market, true?
[21] MR. SCHROEDER: Objection, vague, confusing,
[22] lacks foundation and calls for speculation.
[23] BY MR. CASTRO:
[24] Q: The product produced by the '027 Patent,

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[1] see that?
[2] A: Uh-huh.
[3] Q: Was that the charge, so to speak, given
[4] to them?
[5] A: The overall charge was to take our
[6] existing product that we had changed versus the new
[7] product against competition and kind of see that —
[8] see that we made a good change, I mean that it was
[9] a change for the better.
[10] Q: Here is where I saw these surveys, more
[11] specific surveys, and that's why I asked whether
[12] these underlying surveys were kept. If you look at
[13] 3575, it even is specific about meat color. So
[14] you're going to look and see if those documents are
[15] retained by the company?
[16] A: Yes.
[17] MR. CASTRO: Okay. Let me check my notes. I
[18] think I'm done, Bob.
[19] MR. SCHROEDER: Okay.
[20] (WHEREUPON, a short break was
[21] taken.)
[22] BY MR. CASTRO:
[23] Q: Just a few more questions, two or three.
[24] Do you consider the '027 process a valuable

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[1] that allowed your company to better compete with
[2] other companies who produced a similar product, is
[3] that true?
[4] MR. SCHROEDER: Lacks foundation, calls for
[5] speculation.
[6] THE WITNESS: Can you repeat that?
[7] BY MR. CASTRO:
[8] Q: Sure. Was Conagra able to compete
[9] better in this turkey breast market by virtue of
[10] the products produced by the '027 Patent?
[11] MR. SCHROEDER: Same objection.
[12] BY THE WITNESS:
[13] A: In my opinion, it's a better product.
[14] Regardless of the — how it's done from a
[15] consumers' standpoint, I think consumers look
[16] toward — you know, toward product improvements in
[17] general, and they expect high product quality. And
[18] I think that in the case of Butterball, we needed
[19] to deliver that and try to meet their expectations,
[20] in particular for Butterball what that brand should
[21] mean in terms of turkey.
[22] Q: So your answer would be yes?
[23] A: I think generally yes, yes.
[24] Q: Are there any products produced by

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[1] Conagra which are not made with the 027 process
[2] that compete with the products made with the 027
[3] process?
[4] **MR. SCHROEDER:** Objection, calls for
[5] speculation, lacks foundation.
[6] **BY MR. CASTRO:**
[7] **Q:** If you know.
[8] **MR. SCHROEDER:** Same objection.
[9] **THE WITNESS:** Can you repeat it again? I'm
[10] just thinking.
[11] **MR. CASTRO:** Could you read that back to her?
[12] (WHEREUPON, the record was
[13] read by the reporter.)
[14] **BY THE WITNESS:**
[15] **A:** One could argue that we have other
[16] flavored turkey breasts — we have other poultry
[17] products that are not produced in this manner that
[18] a retailer may make a decision in carrying one
[19] versus the other, you know, but I can't think of
[20] anything.
[21] **Q:** Okay. Sales volumes, from the date of
[22] introduction of the products made with the 027
[23] process, do you know by year the sales volumes into
[24] the deli counter?

[1] continues to grow, the sales of those products
[2] continue to grow year by year?
[3] **MR. SCHROEDER:** Objection unless you define
[4] what are those products.
[5] **BY MR. CASTRO:**
[6] **Q:** Oh, the products that are produced by
[7] the '027 Patent.
[8] **MR. SCHROEDER:** Objection, lacks foundation
[9] and calls for speculation.
[10] **BY THE WITNESS:**
[11] **A:** I can't speak to the whole market share
[12] thing. Tim can talk to our sales volumes which I
[13] think are directionally better, you know, so it's
[14] the same detail question.
[15] **MR. CASTRO:** I have nothing further.
[16] **EXAMINATION**
[17] **BY MR. SCHROEDER:**
[18] **Q:** Ms. Burns, have you seen what has been
[19] referred to here as the '027 Patent?
[20] **A:** I've seen the document, but I haven't
[21] read it in any detail.
[22] **Q:** Are you familiar with the manner in
[23] which the scope of a patent is determined?
[24] **A:** No.

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[1] **A:** You mean the Conagra numbers of sales
[2] volumes?
[3] **Q:** Yes, or is that for Tim?
[4] **A:** That might have to be a Tim. I mean I
[5] don't have those numbers.
[6] **Q:** What about the sales prices, is that
[7] Tim?
[8] **A:** When we talked about sales prices, that
[9] might be Tim if you want specific numbers. I can
[10] speak to the general fact or the fact that we
[11] didn't increase our price to the retailer.
[12] **Q:** What about profit, did your profit
[13] increase?
[14] **A:** To my knowledge, it did. But again that
[15] would be best answered by Tim in terms of the
[16] details of that.
[17] **Q:** Have you received feedback from your
[18] retailers as to the success of that product?
[19] **A:** Yes, I believe so. I personally can't
[20] say, okay, retailer X, Y or Z said this, but in
[21] general, I believe it was well received.
[22] **Q:** And still is today?
[23] **A:** Yes. Yes, I believe so.
[24] **Q:** Do you see a trend that that product

[1] **Q:** So when you're talking about comparing
[2] the process of the '027 Patent with other
[3] processes, is it fair to say that you don't know
[4] how different from the process described in the
[5] '027 Patent a process would have to be before it
[6] falls outside of the patent?
[7] **MR. CASTRO:** Objection.
[8] **MR. SCHROEDER:** What's the objection?
[9] **MR. CASTRO:** Assumes facts not in evidence.
[10] She didn't talk about different processes. She
[11] talked about different products.
[12] **BY MR. SCHROEDER:**
[13] **Q:** Go ahead.
[14] **A:** I don't — I would agree with that.
[15] **Q:** Very good. Now, one of the products
[16] that you spoke of was an Eckrich product, and is
[17] that a product similar to the Healthy Choice and
[18] Butterball products of which you spoke?
[19] **A:** Yes, it is.
[20] **Q:** Do you have any idea — can you give us
[21] any idea of how significant those Eckrich sales are
[22] in comparison to the others?
[23] **A:** They're small.
[24] **Q:** Can you quantify that in any way? Less

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[1] than 1 percent, less than 10 percent?
[2] A: Yes, less than say 5 percent.
[3] Q: We talked about a term called food
[4] service today. Would you define that for us?
[5] A: Yes. It's an area. It's selling your
[6] customer — selling products through food service
[7] type outlets which would include hospitals,
[8] education, restaurants, a lot of different
[9] channels.
[10] In our organization, that group is
[11] marketed to differently, it's sold to differently.
[12] Sometimes products are sold to that channel
[13] differently than in a deli. The big difference I
[14] think is that the consumer doesn't see the end
[15] product. It's not exposed to it necessarily in
[16] terms of a branded nature for the most part. It's
[17] not in a retail setting.
[18] Q: Are products sold through supermarkets
[19] considered food service?
[20] A: No, they're not.
[21] Q: Now, the products that we have been
[22] talking about today, the Golden Brown Oven Roasted
[23] turkey breast products, both the Butterball and the
[24] Healthy Choice, and include the Eckrich product as

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[1] well, are those products primarily food service
[2] products?
[3] A: They're primarily retail products. So,
[4] no, they're not.
[5] Q: Do you have any idea what percentage of
[6] those products are sold through food service?
[7] A: No, I don't.
[8] MR. SCHROEDER: I have no further questions.
[9] EXAMINATION
[10] BY MR. CASTRO:
[11] Q: When Mr. Schroeder asked you about the
[12] percentage of product that makes up the Eckrich
[13] brand, you said less than 5 percent. 5 percent per
[14] year?
[15] A: 5 percent of the total mix, so if
[16] Conagra poultry business was 10 million pounds,
[17] it's, you know, less than a million.
[18] Q: It's not 5 percent of the products
[19] produced by the '027 Patent? It's 5 percent of the
[20] overall poultry product produced by Conagra, true?
[21] A: That's correct.
[22] Q: How much is that dollar-wise?
[23] A: Is the overall poultry products?
[24] Q: 5 percent.

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[1] A: The 5 percent. Dollar-wise, can you be
[2] more specific?
[3] Q: Per year.
[4] A: My guess is that it's a million pounds a
[5] year. Again that might be better for Tim.
[6] Q: 5 percent is a million pounds?
[7] A: Roughly. I think it's about a million
[8] pounds.
[9] Q: And what does that equate to, roughly?
[10] A: So that would be — wholesale would be
[11] 2.50 times that, and retail would be like —
[12] Q: \$250?
[13] A: \$2.50.
[14] Q: I'm sorry, \$2.50.
[15] A: So to the consumer, it would be roughly,
[16] you know — or 2.25. It's lower cost. It's
[17] probably lower cost than a Butterball, so it might
[18] be more like \$2.00, you know, and 3.99 a half pound
[19] at retail.
[20] Q: And your poultry, what are your
[21] pounds — how many pounds a year does that consist
[22] of in Conagra, your poultry sales?
[23] A: Total poultry is — and Tim can speak to
[24] this — at the time that I worked on the business,

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[1] total poultry was roughly 20 million pounds.
[2] Q: Per year?
[3] A: That excluded Healthy Choice. I'm not
[4] sure what the Healthy Choice was. Yes, 20 million
[5] pounds a year.
[6] Q: That excludes Healthy Choice?
[7] A: Yes.
[8] Q: What makes up the poultry end of the
[9] business?
[10] A: Primarily Butterball. 80 percent of
[11] that is Butterball turkey.
[12] Q: And what percentage of the poultry
[13] business sales pertain to the Butterball brand made
[14] by the '027 process?
[15] MR. SCHROEDER: Objection, calls for
[16] speculation, lacks foundation.
[17] MR. CASTRO: If it's good for the goose, it's
[18] good for the gander.
[19] MR. SCHROEDER: Go ahead.
[20] BY THE WITNESS:
[21] A: Tim can probably talk better in numbers.
[22] But most of Butterball, I would say maybe 40
[23] percent of it is golden — is the oven roasted
[24] category which is made under the process that we're

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[1] talking about here.
[2] **BY MR. CASTRO:**
[3] **Q:** And that's 40 percent of 20 million?
[4] **A:** Yes.
[5] **Q:** And then there is a whole separate
[6] category of Healthy Choice that's not included in
[7] that poultry business, true?
[8] **A:** Correct, correct.
[9] **Q:** What's the volume of sales, roughly, of
[10] the Healthy Choice brand?
[11] **A:** I don't know about the Healthy Choice
[12] because poultry is just one piece of it. There is
[13] ham and beef. It crosses different proteins, and
[14] then again within poultry, you have to drill down
[15] for the RPs of that, so Tim would be better to
[16] answer the Healthy Choice. I was more
[17] knowledgeable on the Butterball piece of it.
[18] **Q:** Okay. You don't make any ham products,
[19] do you?
[20] **A:** Not to my knowledge.
[21] **Q:** From the '027 Patent process?
[22] **A:** Not to my knowledge.
[23] **MR. CASTRO:** Nothing further.
[24]

[1] only or attorneys only under the protective order
[2] starting with the point at which we excluded
[3] Mr. Howard from the deposition. I'd ask that the
[4] designation be noted on the cover of the
[5] transcript.
[6] I would also like to indicate at this
[7] time that the deposition taken yesterday of
[8] Dr. Salm is designated confidential but not
[9] attorneys only and the Exhibits to that deposition
[10] as well as the Exhibits to the other depositions
[11] retain their original designation without regard to
[12] the designation given to the deposition to which
[13] they are appended.
[14] **MR. CASTRO:** Very good.
[15] **MR. SCHROEDER:** The deposition of Dr. Hussain
[16] is also designated as confidential but not
[17] attorneys' eyes only.
[18] **MR. CASTRO:** Very good.
[19] **FURTHER DEPONENT SAITH NOT.**
[20]
[21]
[22]
[23]
[24]

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[1] **EXAMINATION**
[2] **BY MR. SCHROEDER:**
[3] **Q:** This number of a million pounds that you
[4] gave for Eckrich, what products are included within
[5] that million pounds?
[6] **A:** Mainly one which is the Oven Roasted,
[7] the Eckrich Oven Roasted. I think we only have a
[8] couple customers with that and it's one SKU.
[9] **Q:** What's an SKU?
[10] **A:** I'm sorry, it's one product. It's an
[11] individual product.
[12] **MR. SCHROEDER:** Thank you.
[13] **EXAMINATION**
[14] **BY MR. CASTRO:**
[15] **Q:** Well, I want to make sure we're accurate
[16] here. When you talked about 5 percent — less than
[17] 5 percent of the total poultry business, that
[18] represents product under UPC code 05682?
[19] **A:** That's correct.
[20] **MR. CASTRO:** Thank you. Nothing further.
[21] **MR. SCHROEDER:** Nothing further.
[22] I would like the Reporter to make a
[23] notation at the end of this deposition that we have
[24] designated this as confidential attorneys' eyes

[1] UNITED STATES DISTRICT COURT
[2] WESTERN DISTRICT OF OKLAHOMA
[3] UNITHERM FOOD SYSTEMS, INC.,)
[4] an Illinois corporation, et al.,)
[5] Plaintiffs,)
[6] vs.) No. CIV 01-347-C
[7] SWIFT-ECKRICH, INC.,)
[8] Defendant.)
[9]
[10] I hereby certify that I have read the
[11] foregoing transcript of my deposition given at the
[12] time and place aforesaid, consisting of Pages 1 to
[13] 139, inclusive, and I do again subscribe and make
[14] oath that the same is a true, correct and complete
[15] transcript of my deposition so given as aforesaid,
[16] and includes changes, if any, so made by me.
[17]
[18] SUSAN BURNS
[19]
[20] SUBSCRIBED AND SWORN TO
[21] before me this day
[22] of , 2002
[23]
[24] NOTARY PUBLIC

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(1) STATE OF ILLINOIS)
(2)) SS:
(3) COUNTY OF WILL)
(4) I, GAIL LIVIGNI, a Notary Public within
(5) and for the County of Will, State of Illinois, and
(6) a Certified Shorthand Reporter of said state, do
(7) hereby certify:
(8) That previous to the commencement of the
(9) examination of the witness, the witness was duly
(10) sworn to testify the whole truth concerning the
(11) matters herein;
(12) That the foregoing deposition transcript
(13) was reported stenographically by me, was thereafter
(14) reduced to typewriting under my personal direction
(15) and constitutes a true, complete and correct record
(16) of the testimony given and the proceedings had;
(17) That the said deposition was taken
(18) before me at the time and place specified;
(19) That I am not a relative or employee or
(20) attorney or Counsel, nor a relative or employee of
(21) such attorney or Counsel for any of the parties
(22) hereto, nor interested directly or indirectly in
(23) the outcome of this action.
(24)

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(1) IN WITNESS WHEREOF, I do hereunto set my
(2) hand and affix my seal of office at Chicago,
(3) Illinois, this 19th day of February, 2002.
(4)
(5)
(6)
(7)
(8) Notary Public, Will County,
(9) Illinois.
(10) My commission expires 9/8/03
(11)
(12) C.S.R. Certificate No. 84-1965
(13)
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